

434 & 435

SUPREME COURT OF THE UNITED STATES

No.

October Term, 1913.

**HENRY E. MEEKER, Surviving Partner of the firm of
HENRY E. MEEKER and CAROLINE H. MEEKER,
doing business under the trade name of MEEKER &
COMPANY,**

*Petitioner and Defendant-in-Error,
vs.*

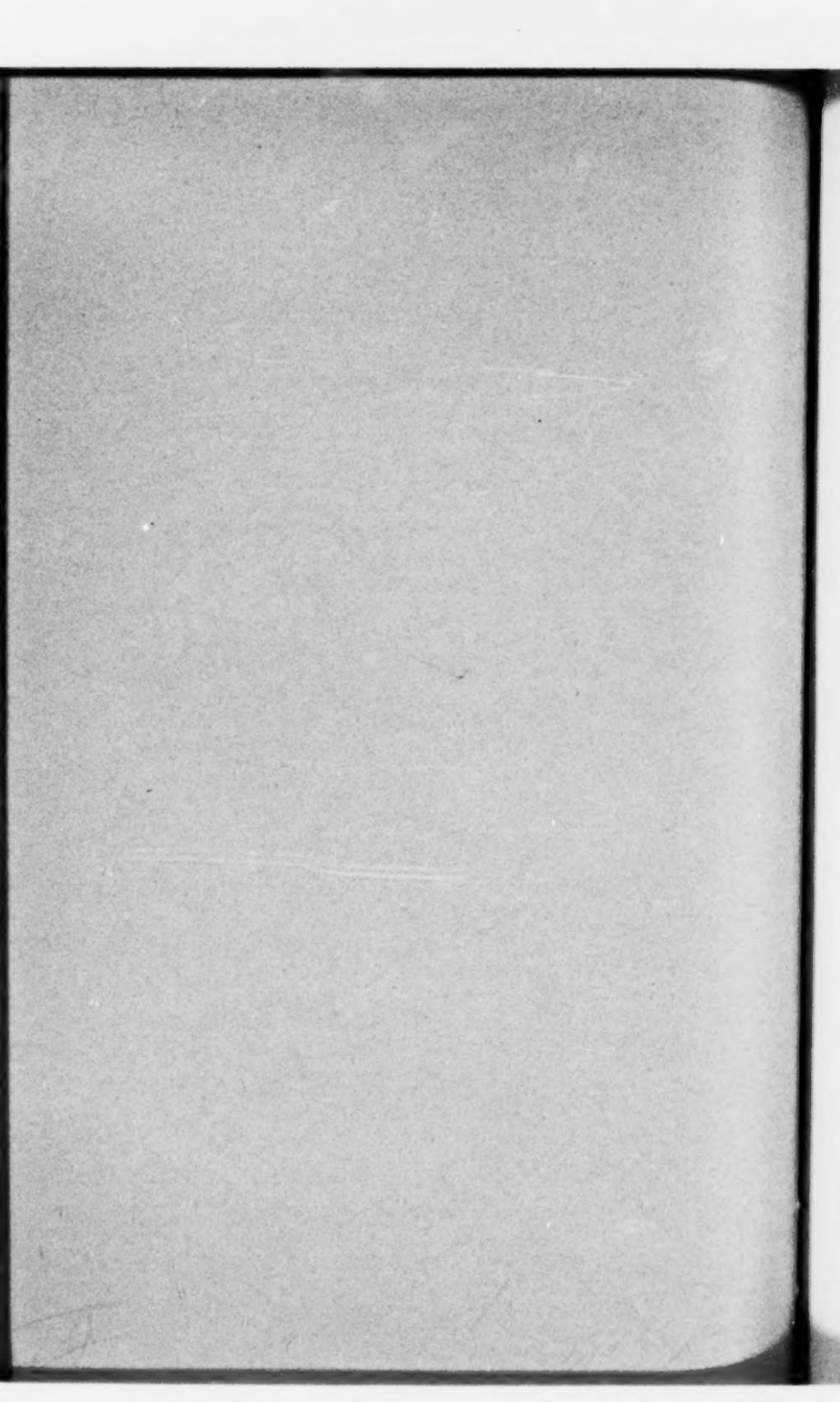
**LEHIGH VALLEY RAILROAD COMPANY,
Respondent and Plaintiff-in-Error.**

**HENRY E. MEEKER,
Petitioner—Defendant-in-Error,
vs.**

**LEHIGH VALLEY RAILROAD COMPANY,
Respondent—Plaintiff-in-Error.**

**Petition for Writs of Certiorari to be ad-
dressed to the Judges of the United States
Circuit Court of Appeals for the Third Cir-
cuit.**

**WM. A. GLASGOW, JR.,
JOHN A. GARVER,
Attorneys for Petitioner.**



IN THE
Supreme Court of the United States.

No. October Term, 1913.

HENRY E. MEEKER, Surviving Partner of the firm
of Henry E. Meeker and Caroline H. Meeker, do-
ing business under the trade name of Meeker &
Company,

Petitioner and Defendant-in-Error,
vs.

LEHIGH VALLEY RAILROAD COMPANY,
Respondent and Plaintiff-in-Error.

HENRY E. MEEKER,
Petitioner—Defendant-in-Error,
vs.

LEHIGH VALLEY RAILROAD COMPANY,
Respondent—Plaintiff-in-Error.

**PETITION FOR WRITS OF CERTIORARI TO BE
ADDRESSED TO THE JUDGES OF THE
UNITED STATES CIRCUIT COURT OF AP-
PEALS FOR THE THIRD CIRCUIT.**

Your petitioner, Henry E. Meeker, Surviving
Partner, etc., respectfully shows:

I. That the questions in the decision of the above cases in the Circuit Court of Appeals for the Third Circuit, involved only the proper construction to be given to the Act to Regulate Commerce and the provisions thereof, as to the recovery of reparation or damages awarded by an order or orders of the Interstate Commerce Commission.

II. On the 17th day of July, 1907, Meeker, Petitioner here in the first case above, (defendant-in-error), filed his petition as complainant before the Interstate Commerce Commission, charging:

(a) That the defendant, the Lehigh Valley Railroad Company, unjustly discriminated against the complainant in the rates charged to him for the transportation of coal from the Wyoming Region of Pennsylvania to Perth Amboy, New Jersey, during the period from November 1st, 1900, to August 1st, 1901.

(b) That the defendant charged and collected from the complainant unreasonable rates for the transportation of coal from the Wyoming Region of Pennsylvania to Perth Amboy, New Jersey, during the period from August 1st, 1901 to July 17th, 1907; and the complainant prayed that the Commission might enter an order requiring the defendant to cease and desist from the unjust discrimination alleged, and from charging the complainant unreasonable rates for the transportation aforesaid, and award to complainant reparation or damages for the wrongs suffered by him.

III. The Commission made an exhaustive investigation, extending over a period of four years, hear-

ing the evidence (over 3000 pages), submitted both by the complainant and the defendant, and on the 8th day of June, 1911, filed its report (Record, p. 24), and on May 7th, 1912, filed its supplemental report (Record, p. 15), which said report and supplemental report stated "the conclusions of the Commission", and also included "the findings of fact on which" the Commission subsequently entered its order and award of damages; and on the 8th day of June, 1911, aforesaid, the Commission entered its order in the case, referring to its report, requiring the Lehigh Valley Railroad to "cease and desist from charging the rates then in effect" which were held to be unjust and unreasonable, and prescribing what were the reasonable and just rates to be observed for transportation of anthracite coal from the Wyoming Coal Region in Pennsylvania to Perth Amboy, New Jersey. On the 7th day of May, 1912, the Commission entered a further order (Record, p. 19), finding the reparation or damages to which complainant was entitled, both for the unjust discrimination in rates practiced by the defendant "during the period from November 1st, 1900 to August 1st, 1901", and also for the unreasonable rates charged complainant by the defendant from August 1st, 1901 to July 17th, 1907. Subsequently, on June 15th, 1912, the Commission entered a supplemental order (Record, p. 22), correcting a technical error in the name of the complainant, and extending the time within which the defendant was required to comply with the order of the Commission, to the first day of August, 1912.

IV. Findings of the Commission in its report and supplemental report and orders aforesaid, were as follows:

(a) AS TO UNJUST DISCRIMINATION DURING THE PERIOD FROM NOVEMBER 1st, 1900 TO AUGUST 1st, 1901.

1. In its report of June 8th, 1911, the Commission found that the complainant had sustained "the allegation of unjust discrimination" against him in rates during the period from November 1st, 1900 to August 1st, 1901, (Record, p. 36).

2. In its supplemental report, the Commission states that it found that the rates charged complainant from November 1st, 1900 to August 1st, 1901, "were unjustly discriminatory", and further finds that "from November 1st, 1900 to August 1st, 1901, complainant shipped" a certain number of tons of coal and paid thereon the sum of \$129,989.18, "at the rates found to have been unjustly discriminatory" (Record, pp. 16-17).

3. By the order of June 15th, 1912, upon the evidence of damage presented, reparation was awarded for the period November 1st, 1900, to August 1st, 1901, "for unjustly discriminatory rates charged", and "which rates so charged have been found by the Commission to have been unjustly discriminatory, as more fully and at large appears in and by said report of the Commission" (Record, p. 23).

(b) AS TO THE UNREASONABLE RATES CHARGED BY THE DEFENDANT FROM AUGUST 1st, 1901 TO JULY 17th, 1907.

1. In its report of June 8th, 1911, the Commission found that "defendant's rates for the transportation of coal * * * * are unreasonable so far as they exceed" the rates therein prescribed, and they found upon the evidence, that reparation should be awarded

"upon the basis of the rates herein found to be reasonable upon all shipments * * * * * since August 1st, 1901," (Record, pp. 72-3).

2. In its supplemental report, the Commission states: "We further found that the rates in effect from August 1st, 1901 to July 17th, 1907 were unreasonable"; and further found that during that period complainant shipped certain coal "and paid charges thereon amounting to \$685,375.27, at the rates found to have been unreasonable", (Record, pp. 16-17).

3. In its order of June 15th, 1912, the Commission, upon the evidence, awards the complainant reparation for the period from August 1st, 1901, to July 17th, 1907, "for unreasonable rates charged for the transportation" of coal, "which rates so charged have been found by this Commission to have been unreasonable, as more fully and at large appears in and by said report of the Commission."

V. Finding of the Commission as to the "violation of the provisions" of the Act to regulate Commerce, that the plaintiff was "injured thereby", and the "amount of damages sustained".

(a) The supplemental report (Record, pp. 16-17) finds upon the evidence, that "from November 1st, 1900, to August 1st, 1901, complainant shipped from the Wyoming Coal Region of Pennsylvania to Perth Amboy, New Jersey," a certain specified number of tons of coal, "and paid charges thereon amounting to \$129,989.18, at the rates found to have been unjustly discriminatory; that the complainant *has been damaged* to the extent * * * * * of \$11,009.33, with interest thereon from August 1st, 1901".

(b) The supplemental report then finds (Record,

pp. 16-17) the number of tons of coal shipped by complainant between August 1st, 1901 and July 17th, 1907, and that complainant "*paid charges thereon* amounting to \$685,375.27, at the rates found to have been unreasonable; *that complainant has been damaged* to the extent of the difference between the amount which he did pay and \$626,945.62, the amount which he would have paid at the rates found reasonable", etc., amounting to "\$58,326.45", with interest amounting to \$27,750.64 to September 1st, 1911, "together with interest on said sum of \$58,236.45 from September 1st, 1911." The order of the Commission of June 15th, 1912, (Record, p. 22) as required by Section 16 of the Act, then authorizes and directs the defendant to pay to complainant the amount he "*has been damaged*, as found by the Commission in its supplemental report setting forth the amount in dollars and cents."

Thus the Commission found by the supplemental report and order aforesaid, both "*the fact*" that complainant was damaged and the "*amount of damage*" which was sustained by him; the Commission found a "*violation of the provisions*" of the Act by the defendant; that complainant was "*injured thereby*"; "*the full amount of damages sustained*", and that the damages were sustained "*in consequence*" of defendant's violation of the Act; and this finding fully met the requirement of Section 14 of the Act, that the report of the Commission shall "*include* the findings of fact on which the award is made"; and upon these facts so found, Section 8 declares the carrier "*liable*", and Section 16 requires that "*the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.*"

VI. The Railroad Company having declined to

pay the amounts which it was thus directed to pay, thereafter on the third of September, 1912, petitioner filed his petition against the Company in the District Court of the United States for the Eastern District of Pennsylvania, "for the enforcement of an order" of the Commission "for the payment of money" (Section 16), and praying for judgment for the amount awarded to him under the order of the Commission aforesaid. On October 5th, 1912, the Company filed its plea to the petition, and on November 11th and 12th, the case was tried in the District Court. On the trial the petitioner offered (Record, p. 92):

First. The report of the Commission and the orders thereto attached, dated June 8th, 1911 (Exhibit C, Record, pp. 24 to 74, inclusive).

Second. The supplemental report (Record, pp. 107, 115, 116) of the Commission, with the order thereto attached, dated May 7th, 1912 (Record, pp. 15 to 20, both inclusive, Exhibit A).

Third. The order (Record, p. 116) of the Commission, dated June 15th, 1912, amending the order of May 7th, 1912, (Supplemental Order, Record, p. 22, Exhibit B).

It was further admitted by the defendant (Record, p. 116) that the reports and orders above set forth were duly served upon it.

The petitioner testified as a witness in his own behalf, and thereupon the petitioner's case was closed.

No evidence was offered by the defendants, except that, upon the plea of the Statute of Limitations, certain itemized statements were filed showing the dates of the shipment of the coal (being the same statements which were in evidence before the Commission and

upon which its reparation orders were based)—(Record, p. 143).

At the close of the case, the Court requested that Exhibits 1, 2, and 3 (being Exhibits A, B, and C above referred to) "be read to the jury" (Record, p. 138); and, thereupon, counsel for the plaintiff "Mr. Glasgow read to the jury what he stated to be material portions of said Exhibits." To the reading of the portions of the Exhibits, as requested by the Court, there was no objection by the defendant (although the defendant had objected to the Exhibits aforesaid, as a whole).

After the charge of the Court (Record, p. 193), the case was submitted to the jury, which "rendered a verdict in favor of the plaintiff for \$109,280.17."

Thereupon, the Railroad Company moved for a new trial and filed its reasons therefor; and on December 9th, 1912, an order was entered (Record, p. 212), denying the motion, and, upon evidence presented, fixing the attorney fees for services for complainant before the Commission and in the action. (Record, p.). Thereupon, the Railroad Company filed its bill of exceptions, and a writ of error was allowed by the Circuit Court of Appeals to review the judgment of the District Court aforesaid.

The case was argued in the Circuit Court of Appeals in April, 1913; and, in the following August, an opinion was handed down, reversing the judgment of the District Court and directing a new trial, on the ground that the findings of the Commission were not in the form required by the Act and further that the findings and order of the Commission and the facts "therein stated" could not, under the Act, in any case, be sufficient evidence of the *plaintiff's case* and of the defendant's liability in damages.

On the 25th of September, 1913, petitioner filed his

petition for a rehearing and reargument in the Circuit Court of Appeals, *which petition was granted*. The case was reargued in December; and an opinion was handed down in February, 1914, reaffirming the previous decision.

VII. In its first opinion in this case (page 5), which is reaffirmed by the second opinion, the learned Circuit Court of Appeals states:

"By this report the Interstate Commerce Commission held that the charges by the defendant to the plaintiff between November 1st, 1900 and August 1st, 1901 were discriminatory and therefore unlawful, and also that the charges of the defendant company between August 1st, 1901 and July 1st, 1907 were unreasonable."

There can, therefore, be no dispute that the Commission did actually find that the rates charged petitioner from November 1st, 1900 to August 1st, 1901 were discriminatory and unlawful, and that the rates charged petitioner between August 1, 1901 and July 1st, 1907 were unreasonable and therefore unlawful. Nor can it be suggested that the Court experienced any difficulty in ascertaining that the Commission so found, regardless of the forms of the reports.

In the first opinion of the learned Circuit Court of Appeals (at pages 16-17), three propositions are stated, as requiring the reversal of the judgment of the District Court. These propositions were modified in the second opinion of the Court; but the conclusion reached was equally erroneous. The propositions as modified (see second opinion, page 16), are as follows:

"(1) That the finding of the Commission as to the reasonableness or otherwise of the rate charged by the carrier in interstate commerce, is charged by the carrier, is an administrative func-

tion properly and constitutionally delegated by the legislative power to the Commission, and is, if lawfully made, conclusive. If such finding of the Commission is, that a given rate charged by a carrier is unreasonable, it is as if the unreasonableness of such rate were fixed by the statute. The lawfulness of such finding is subject to judicial inquiry only in the respects above referred to.

(2) The finding by the Commission, that a given rate is unreasonable, while pertinent to the issue, in that it establishes a violation of the Act, is not decisive of the question of liability for damages, under Section 8, in such case as the present, either *prima facie* or otherwise.

(3) The pertinency and evidential weight and value of the facts as to which the findings and order are *prima facie* evidence, are for the determination of the court and jury, as in other civil causes. They may or may not make out a *prima facie* case for the plaintiff."

And the erroneous view of the Circuit Court of Appeals is shown in its first opinion, as corrected, page 26, as follows:

"On the contrary, as will be seen in the above extracts from the charge, the Court gave the jury to understand that the report and findings of the Commission as to discrimination and unreasonableness and the award of damages made thereon, were *prima facie* evidence of the plaintiff's case and of the liability of the defendant and conclusive upon the defendant unless he could rebut the same. In this we think the court was clearly in error."

From the above views of the Court, it is evident that its reversal of the judgment was based upon the erroneous view that the finding of the Commission that the defendant was guilty of a "violation of the provisions" of the Act, in that it practiced unjust discrimina-

tion against the petitioner and charged and collected from him unreasonable rates, and that the petitioner was "injured thereby", and the finding of "the full amount of damages sustained", and that such damages were sustained "in consequence" of defendant's violation of the Act, were insufficient evidence of the plaintiff's case and of the liability of the defendant, and even in the absence of any rebutting testimony by the defendant, that the petitioner was not entitled to judgment, even though the jury on this evidence found for the plaintiff.

This view of the Court is in conflict with the opinion of this Court in the case of *Mitchell Coal Co. vs. Pennsylvania R. R. Co.*, 230 U. S. 247, at page 258, where the Court, through Mr. Justice Lamar, speaking of reparation orders of the Commission, says:

"Such orders, so far as they are administrative, are conclusive, whether they relate to past or present rates, and can be given general and uniform operation, since all shippers who have been or may be affected by the rate can take advantage of the ruling and avail themselves of the reparation order. They are quasi-judicial, and only *prima facie* correct in so far as they determine the *fact and amount of damage*—as to which, since it involves the payment of money and taking of property, the carrier is by Section 16 of the Act given its day in court and the right to a judicial hearing. (March 2, 1889, 25 Stat. 855, 859, c. 382)" (Italics ours).

If the report and order of the Commission furnishes *prima facie* evidence of "the fact and amount of damage", it is obvious error to reverse a judgment upon the verdict of a jury for the plaintiff in accordance with the finding of the Commission, *where no evidence was introduced by the defendant rebutting the same*.

Under its second proposition above, taken in connection with the first, the Court states that a finding by the Commission that a rate is unreasonable, is conclusive that there was "a violation of the Act", yet that such finding "is not decisive of the question of liability for damages, under Section 8 in such case as the present, *either prima facie or otherwise*" (Italics ours). Section 8 provides that when it is shown that the carrier has been guilty of "any such violation of the provisions of this act", it "shall be liable". The violation of the Act creates under the law a liability for at least nominal damages; and, in order to justify substantial recovery the Commission must find, on evidence submitted, "the full amount of damages" suffered by complainant "in consequence of any such violation" of the Act.

Under its third proposition, the Court holds that plaintiff "may or may not" make out a *prima facie* case by offering the reports and orders of the Commission finding that the carrier had violated the provisions of the Act; that complainant had been "injured thereby", and the amount "of damages sustained" by complainant "in consequence of" the violation of the provisions of the Act. It would seem obvious under Section 16, that such proof, unrebutted, would entitle the plaintiff to recover.

VIII. The learned Circuit Court of Appeals apparently misapprehended the views of this Court in the case of *Pennsylvania Railroad Co. vs. International Coal Mining Co.*, 230 U. S. 184, and, in its first opinion (page 27), which view was reaffirmed in its second opinion, states:

"It hardly needs to be pointed out that the *ratio decidendi* of the Supreme Court" (in the International Coal Company case) "does not differ from that applicable to the present case."

This is a clear misconception. That was a common law action for damages, *without previous complaint to the Commission*, in which the burden of proof was upon the plaintiff; and the Court held, that while the plaintiff had shown the wrong committed by the defendant, it had failed to show that it was "injured thereby", and, therefore, that the proof was insufficient to meet the provisions of Section 8 of the Act; and the Court reversed the case, sending it back for a new trial. There was no finding and order of the Commission in that case, *as there is in the present case*; and the proof which was lacking in that case *was supplied in this case*, by the reports and orders of the Commission.

The International Coal Company case was reversed, because (230 U. S. 204):

"It is elementary that in a suit at law, both *the fact and the amount of damage* must be proved;"

and the proof was lacking.

In the case of *Mitchell Coal Company vs. Pennsylvania R. R. Co.*, 230 U. S., at page 258, this Court said that the orders of the Commission are to be taken by the Courts as *prima facie correct*, in so far as they determine "*the fact and amount of damage*".

In the present case, the complainant, *before the Commission*, gave evidence of the damage to his business by the unlawful discrimination from November 1st, 1900, to August 1st, 1901, and also showed that the prices of coal at tidewater were fixed by a circular of the Lehigh Valley Coal Company, the entire capital stock of which was owned by the Lehigh Valley Railroad Company; and that petitioner was in direct competition at tidewater in the sale of coal with the said Coal Company,

which controlled about 95% of the shipments over said Railroad to tidewater from the Wyoming Region; and that petitioner could not obtain a better price for his coal than that fixed by the Coal Company; and that having sold his coal at the price fixed by that Company, he was required by the Railroad Company to pay a greater amount in freight rates than his competitor. Evidence was also presented showing the unreasonableness of the rates charged to petitioner from August 1st, 1901, to July 1st, 1907, and his damage; and upon the evidence before it, the Commission found both "*the fact and amount of damage*". When, therefore, Section 16 of the Act provides "that on the trial of such suit the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated", it must necessarily follow that the shipper may rely on the findings of the Commission, and that it is not necessary, in the District Court, to present *all over again* the evidence showing *the fact and amount of damage*, especially when no evidence is offered by the defendant in rebuttal of the findings of the Commission, and when the evidence before the Commission is not put in evidence.

IX. At page 28 of its first opinion (reaffirmed in the second opinion), the learned Circuit Court of Appeals held:

"Nor more, in this case can the difference between what is found by the Commission to be the unreasonable tariff rate and that fixed as a reasonable one, be made the measure of the damage that the plaintiff has suffered."

This conclusion is in direct conflict with decisions of this Court and with decisions of the Circuit Court of Appeals in the Seventh and Ninth Circuits, as appears by the brief submitted herewith.

X. In the report of the Committee of the Senate on Interstate Commerce, of January 18, 1886, just prior to the passage of the Interstate Commerce Act, there appears a statement by the Committee of the purposes of the Act to Regulate Commerce. At page 214, the Committee says:

"Nor is it proposed to compel any citizen to rely solely upon the Commission recommended by this Committee, or to debar him from seeking redress from grievances from the judicial tribunals of the United States if he shall prefer to have recourse to them. On the contrary, it is expressly provided that he shall be free to pursue his remedy at common law or *under the statute herein recommended*, at his own discretion. It is not proposed to in any manner restrict the choice of remedies now available, but it is proposed to provide *additional means of obtaining redress with much less difficulty and expense*, and to render those already existing very much more effective.

"This can best be accomplished, it is believed, *by making the reports and recommendations of the Commission prima facie evidence as to the facts found in all cases which it investigates*. This would do more towards placing the shipper upon an equality with the carrier in a legal controversy than anything else that has been suggested, and would to a considerable extent, obviate the almost insurmountable difficulties now encountered by the shipper.

"With such a change in the rules of evidence, a favorable report by the Commission *would substantially establish the case of the complainant, should judicial proceedings become necessary, as it would lift from his shoulders the burden of proof and transfer it to the carrier*." (Italics ours).

The conclusion of the learned Circuit Court of Appeals destroys all of benefit there is in the Act to shippers, so far as the Act justified the hope of a speedy

and inexpensive recovery for unlawful action on the part of the carrier.

XI. In its first opinion (reaffirmed in the second opinion), the learned Circuit Court of Appeals, in referring to the District Court admitting in evidence the reports and orders of the Commission, at page 20 says:

"As to these documents thus admitted in evidence, it is apparent that the requirement of Section 14, that, 'in case damages are awarded, such report shall include the findings of fact on which the award is made', has not been complied with by any express findings of fact in the supplemental report of May 7th, 1912, in which the award of damages against the defendant is made; that such findings of fact, if any, must be looked for in the voluminous pages of the original report filed June 8th, 1911, to which reference is made in the supplemental report; and that in said original report there are no findings of fact as such, and they must be gathered, if gathered at all, from a mass of recited evidence, statements, opinions and conclusions of the Commission, all of which are irrelevant to an award of actual pecuniary damages."

And, therefore, the Court's conclusion is, that the reports and orders of the Commission should not have been received in evidence in the District Court.

It would seem that the learned Court was clearly in error in concluding that these reports should not have been admitted in evidence in the District Court, when by its own opinion it appears that the reports found facts which it was necessary that the Commission should find before the petitioner could proceed in the courts. (See this petition, paragraph VII). Section 14 requires that, "in case damages are awarded, such report shall *include* the findings of

fact on which the award is made"; and the Commission in this case sets forth clearly its finding the fact of unjust discrimination against the plaintiff from November 1st, 1900 to August 1st, 1901, and that the plaintiff had been charged and had paid as shipper unreasonable rates between August 1st, 1901 and July 1st, 1907; the amount of tonnage shipped upon which plaintiff paid unlawful charges; that plaintiff was damaged and the amount per ton, and the total amount which it was necessary to award to the plaintiff as reparation for the unlawful violation of the Act for which the carrier is made liable by Section 8. There was, thus, every finding of fact required by the Act, upon which "the award is made".

Section 8 specifies the facts which the Commission must find before the carrier can be held liable to "an award". That Section provides, that, if a carrier has violated the "provisions of this Act" by "unjust discrimination" forbidden by Sections 2 and 3 of the Act, or by charging "unreasonable rates" forbidden by Section 1, such carrier "shall be liable". The liability is to the person "injured thereby", and "for the full amount of damages sustained in consequence of any such violation of the provisions of this Act." When the Commission found the fact in this case of "unjust discrimination" and "unreasonable rates", the fact of who was "injured thereby" and "the full amount of damages sustained", then Section 16 required the Commission, being satisfied by its investigation that "any party complainant is entitled to an award of damages" and "for a violation" of the Act, "to make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named."

Section 14 requires the Commission to make a report, "and in case damages are awarded, such report

shall *include* the findings of fact on which the award was made". It is obvious that "the findings of fact" referred to in Section 14 are the same facts which are made the basis of liability under Section 8, and which are made the basis of the "award of damages" by Section 16. In this case, the facts necessary to the liability of the defendant to the plaintiff under Section 8 and to the "award of damages" under Section 16, were beyond all question found by the Commission in its reports and orders; and they were the "findings of fact" referred to in Section 14 "on which the award is made."

The essential facts to sustain petitioner's case having been found by the Commission in its reports and orders, it was an erroneous construction of the Act by the Circuit Court of Appeals to hold that such reports and orders are not admissible in evidence in the District Court because the reports do not contain "an express findings of fact" distinct from the Commission's view of the case and the evidence before it. If the reports and orders of the Commission contain the essential facts justifying the petitioner's recovery, how could the defendant, who offered no evidence in rebuttal, be prejudiced by the Commission's review of the evidence before it and the history of the case?

XII. The Circuit Court of Appeals was also in error in its view as to the Statute of Limitations contained in Section 16 of the Act to Regulate Commerce.

The petitioner's claim, or practically all of it, accrued prior to the passage of the amendatory Act of 1906 (34 Stat. L. 590), and his petition was filed with the Interstate Commerce Commission on July 17th, 1907, and "within one year" after the effective date of the Act of 1906, which contained the first express limitation as to filing claims before the Commission.

At the time the petitioner's claim was filed, it was not barred by any statute of limitations in the State of Pennsylvania, where the claim arose. Section 16 of the Act of 1906 provides:

"All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the Circuit Court or State Court within one year from the date of the order and not after; *provided that claims accrued prior to the passage of this Act may be presented within one year.*"

Under this provision of Section 16, the learned Circuit Court of Appeals holds in its first opinion, page 31 (reaffirmed in its second opinion), "that the Commission in this case had no jurisdiction to entertain a claim of the shipper accruing prior to July 17th, 1905", being a date two years prior to filing the complaint.

The learned Court holds that, notwithstanding the petitioner's claim "accrued prior to the passage of" the Act of 1906, and although his claim was "presented within one year" thereafter to the Commission, the Commission had no jurisdiction "to entertain a claim of the shipper accruing prior to July 17th, 1905." This conclusion of the Court is in direct conflict with the plain provisions of the Statute; and any such construction of the foregoing provisions of Section 16, taking from the petitioner the right to present his claims already accrued and not giving effect to the proviso permitting the claims to be filed "within one year", would render the whole provision as to limitation, in Section 16, unconstitutional.

The above conclusion of the learned Court would bar about 76% of the entire damages awarded to peti-

titioner and is in conflict with many decisions of the Interstate Commerce Commission:

See Interstate Commerce Commission "Conference Ruling, Bulletin No. 5, Rule 10, as follows:

"Claims filed with the Commission since August 28th, 1907 must have accrued within two years prior to the date when they are filed; otherwise they are barred by the Statute. Claims filed on or before August 28th, 1907 are not affected by the two years limitation."

See also 14 I. C. Rep. 199, 206; 23 I. C. C. Rep. 483, 487.

This view of the Court is also in conflict with the opinion of the Circuit Court of Appeals for the Sixth Circuit, in Louisville & Nashville R. R. Co. vs. Dickerson, 191 Fed. 705, reaffirmed in A. J. Phillips Co. vs. Grand Trunk Ry. Co., 195 Fed. 12 at p. 19; and it is in conflict with the decision of this Court in the case of Great Northern Ry. Co. vs. United States, 208 U. S. 452, 468.

The learned Circuit Court of Appeals seems to have entirely overlooked the proviso in Section 16.

XIII. Your petitioner is advised and believes that in the proceedings instituted by him against the Lehigh Valley Railroad Company, the Interstate Commerce Commission followed the practice that it has always heretofore observed in such proceedings, in its manner of making its findings and awards, as well as in the construction of the Statute of Limitations enacted by the amendment of 1906; and if the construction which has now been placed upon the Act by the Circuit Court of Appeals is correct, it will necessitate a complete reversal of the procedure of the Commission, and place a heavier burden upon the shipper than existed at common law.

XIV. In December, 1913, about the same time that this case was reargued before the Circuit Court of Appeals, the similar case of Pennsylvania Railroad Co. vs. W. F. Jacoby & Co., pending in the same Court, was argued. That case also involved the question of the value, as evidence in the Courts, of the findings and orders of the Interstate Commerce Commission in a case in which it awarded reparation. In that case, the Circuit Court of Appeals has certified to this Court three questions of law, "in order that it may be guided to a proper decision of the controversy"; and of the three questions certified, two are as follows:

"(2) Were the finding and the order quoted above, or was either of them—*prima facie* evidence of themselves, or of itself, that the defendant had become liable to Jacoby & Company in some amount by the discriminating practices referred to?"

"(3) If the finding and the order—either, or both, of them—were *prima facie* evidence that the defendant had become liable in some amount, were they—or was either of them—*prima facie* evidence also of the amount of such damage?"

The certification of these questions presents to this Court two of the identical questions passed upon in the present case; and the fact that the Circuit Court of Appeals in this case granted a rehearing, and now, after a reaffirmation of its former opinion, certifies, in another case, two of the questions passed on, evidences the fact that the Court is in doubt upon the questions involved in the present case; and this alone would warrant petitioner in praying that the present case be brought to this Court by certiorari, in order that the very important questions presented may be settled by this Court, along with the Jacoby case, aforesaid; for unless this course is adopted, petitioner will

be required to go back to the District Court and try his case upon an erroneous view of the law, which can only be corrected by writ of error, appeal and a third trial in the District Court.

XV. There was a second complaint made to the Interstate Commerce Commission by petitioner, in his own name; and exactly the same course was followed as is above set forth as to the first case, the only difference being that the partnership of Meeker & Company having been dissolved by the death of one of the partners, it was necessary that the claim should be filed by petitioner individually; and the claim before the Commission was exactly the same, except that the period covered was from July 17, 1907 to April 13, 1910. The two cases were treated by the Commission as being heard at the same time, without objection. The suits to enforce the orders of the Commission were heard at the same time by the District Court, and the Circuit Court of Appeals reversed the judgment of the plaintiff in the second case just as it did in the first; and for the reasons set forth above, a certiorari should bring up both of the cases above mentioned, to the end that speedy justice may be done.

XVI. Petitioner further shows that the questions involved in the issues presented in this cause are of great public importance and affect many cases now pending before the Interstate Commerce Commission and in the Courts of the United States, and that the proper determination of the issues thereof only requires a correct interpretation and construction of the Act to Regulate Commerce; and the confusion produced by the decision of the learned Circuit Court of Appeals in this case will lead to almost interminable litigation and seriously affect the Interstate Commerce Commis-

sion in carrying out the duties put upon it by the Act to Regulate Commerce. In this case, petitioner has been in litigation for nearly seven years, and under the erroneous conclusion of the Circuit Court of Appeals herein, will be required to go back to the District Court and have that Court commit error under the opinion of the learned Circuit Court of Appeals, and then come up to the Circuit Court of Appeals again, have that error affirmed, and then, by writ of error, proceed to this Court, and if this learned Court should then reverse the Circuit Court of Appeals, petitioner will be required to go back to the District Court and retry his case for the third time.

Wherefore, because of the gravity and importance of the questions involved, and in the interest of uniformity of decision, so that a definite and certain construction of the Act to Regulate Commerce may be secured, and so that the *rights of shippers, the obligations of carriers and the duties of the Interstate Commerce Commission* may be correctly established and declared under the Act to Regulate Commerce, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the Judges of the United States Circuit Court of Appeals for the Third Circuit, commanding them and each of them to certify and send to this Court on a day certain to be therein designated, a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals in each of the cases lately depending therein, entitled Lehigh Valley Railroad Company, plaintiff-in-error, vs. Henry E. Meeker, Surviving Partner of the firm of Henry E. Meeker and Caroline H. Meeker, doing business under the trade name of Meeker & Company, defendant-in-error, March Term, 1913, No. 1721, and Lehigh

Valley Railroad Company, Plaintiff-in-error vs. Henry E. Meeker, Defendant-in-Error, March Term, 1913, No. 1720, to the end that the judgments of said Circuit Court of Appeals in said causes may be reviewed as provided by law, and that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem proper and in conformity with law.

And your petitioner will ever pray, etc.

(Sgd.) Henry E. Meeker

Petitioner.

STATE OF NEW YORK,
COUNTY OF NEW YORK. }
ss.

HENRY E. MEEKER, being first duly sworn, says that he is the petitioner; that he has read over the foregoing and annexed petition and knows well the contents thereof, and that he has also carefully read and studied a duly certified copy of the transcript of record under the seal of the United States Circuit Court of Appeals for the Third Circuit in the case of Lehigh Valley Railroad Company, plaintiff-in-error, vs. Henry E. Meeker, Surviving Partner of the firm of Henry E. Meeker and Caroline H. Meeker, doing business under the trade name of Meeker & Company, defendant-in-error, March Term, 1913, No. 1721, and Lehigh Valley Railroad Company, plaintiff-in-error vs. Henry E. Meeker, defendant-in-error, March Term, 1913, No. 1720; that the matters of fact stated in said petition are fully supported in and by said transcripts of record, and are true to the best of his knowledge, information and belief.

HENRY E. MEEKER.

Sworn and subscribed to before
me this 13th day of March,
1914.

Morris Pollinger (Seal)
Notary Public.
102.

In our opinion, the foregoing and annexed petition for certiorari is well founded in law.

WILLIAM A. GLASGOW, JR.,
JOHN A. GARVER,
Counsel for Petitioner.

NOTICE.

To John G. Johnson, Esq.,
Attorney for Lehigh Valley Railroad Company,
Sir:

You will please take notice that on the ~~30th~~ day of March, 1914, at 12 o'clock, noon, or as soon thereafter as counsel may be heard, the foregoing petition and accompanying brief will be submitted to the Supreme Court of the United States, at its usual place for holding its sessions in the Capitol, at Washington, D. C., for its consideration and action, at which time and place you will please take such action in the premises as you may be advised.

Wm. A. GLASGOW, JR.,
JOHN A. GARVER,
Counsel for Petitioner.

ADMISSION OF SERVICE.

Service of a copy of the foregoing petition and brief is acknowledged this ~~14th~~ day of March, 1914.

(Sgd.) John G. Johnson
atty. for L.V.R.C.

1800 - 1001.

SUPREME COURT OF THE UNITED STATES

Office Supreme Court, U.
S.
F I L E D
APR 6 1914
JAMES D. MAHER
CLE

In the Matter of the
Petition of HENRY E. MEEKER.

On Application for Writ of Certiorari to the
United States Circuit Court for the Third
Circuit.

BRIEF FOR PETITIONER.

WM. A. GLASGOW, JR.,
JOHN A. GARVER,
Counsel for Petitioner.

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IN THE

Supreme Court of the United States.

October Term, 1913.

In the matter of the Petition of
HENRY E. MEEKER.

BRIEF FOR PETITIONER.

On application for Writs of Certiorari to the United
States Circuit Court of Appeals for the
Third Circuit.

STATEMENT.

Application by Henry E. Meeker, individually and as surviving partner of the firm of Meeker & Co., for writs of certiorari to the United States Circuit Court of Appeals for the Third Circuit, to review two judgments of reversal directed by that Court, the judgments reversed being for \$109,280.17 and \$13,161.78, respectively, in favor of the petitioner.

Meeker & Co. brought an action against the Lehigh Valley Railroad Company, under Section 16 of the Interstate Commerce Act, to recover damages awarded to them by the Interstate Commerce Commission, by reason of violations of the Act in unjustly discriminating against them and in charging unreason-

able rates for transportation of coal over its line to tidewater. The alleged discrimination covered the period from November 1, 1900, to August 1, 1901; and the excessive rates covered the subsequent period from August 1, 1901, to July 17, 1907.

A second action was brought to recover the additional damages awarded on account of unreasonable rates, for the period subsequent to July 17, 1907; but damages were awarded only for the two years prior to April 13, 1910, when the second complaint was made to the Commission.

After a very extensive hearing, covering a period of about four years, the Commission reported in favor of the complainant in both cases, and entered orders awarding the damages to be paid by way of reparation.

Subsequently, the two actions were commenced in the District Court, under Section 16 of the Act, to recover the damages awarded. Upon issue joined, the actions were brought to trial. The plaintiff put in evidence the reports and orders of the Commission and supplemented these by some evidence on the part of the petitioner. The defendant offered no evidence whatever on the question of the rates or damages, merely submitting a computation used before the Commission, as bearing upon the application of the Statute of Limitations. A verdict was rendered in each case in favor of the plaintiff. Thereafter, upon evidence presented in open Court, the trial Judge fixed the attorney's fee for the services before the Commission and in the actions, at \$10,000 and \$2,500, respectively, in each case. Judgments were thereupon entered in favor of the plaintiff for the amounts awarded by the Commission above stated, and the court ordered that the attorney's fees above stated be taxed as a part of the costs in each case, respectively. These judg-

ments were reviewed by the Circuit Court of Appeals, by writ of error. They were reversed by that Court and new trials directed, on the ground that the findings of the Commission were not in the form required by the Act to entitle their use as evidence upon the trial of the actions and that the findings and orders of the Commission are not in any case sufficient to establish a liability on the part of the carrier, even though no evidence may be offered by the carrier. The Appellate Court also held that the Commission had adopted an erroneous theory in awarding the damages.

All these questions involve the construction of the Interstate Commerce Act.

The damages based upon the discrimination were only \$11,009.33 (exclusive of interest), and constituted less than 15% of the entire damages awarded.

On application, the Circuit Court of Appeals granted a reargument; but, after such reargument, it adhered to its previous decision.

At the time of the reargument, there was pending in the Circuit Court of Appeals, an action brought by Jacoby & Co. against the Pennsylvania Railroad Company, in which questions of law were involved, depending upon the construction of the Interstate Commerce Act, similar to those involved in the Meeker cases. Pending its decision of the Jacoby case, the Circuit Court of Appeals has certified to this Court for its instructions, the very questions which it has decided in the Meeker cases.

The practice of the Commission in making its reports in the Meeker cases and in awarding the damages, *has been that which has uniformly been observed by the Commission since its establishment.* The effect of the decision of the Court below is, therefore, to reverse the settled practice of the Commission, to disregard the construction which has for many years

been placed by the Commission upon the Act and to throw a burden upon the shipper in attempting to redress his grievances, greater than that which existed at common law.

On the question of the Statute of Limitations, the Circuit Court of Appeals held that, under the amendatory Act of 1906 (34 Stst. L., 590), permitting complaints to be made on existing claims within one year and barring all other claims at the end of two years, Meeker & Co. could not recover upon any claims arising prior to July 17, 1905 (two years before the complaint was made to the Commission). This decision was also contrary to the construction uniformly placed upon the amendatory Act by the Commission, and the construction of the Commission has heretofore been referred to by this Court with approval. The effect of the decision of the Circuit Court of Appeals on this point is to bar at least 75% of the entire amount of the claims of Meeker & Co., or \$97,518.57 out of a total of \$128,004.26.

If a new trial should be had under the existing decision of the Circuit Court of Appeals, evidence of discriminatory or unlawful rates and consequential damages prior to July 17, 1905, would have to be excluded. If this Court should subsequently hold that the Circuit Court of Appeals was wrong in its construction of the amendment of 1906, a third trial would thus be inevitable. On the other hand, if this Court should, upon review of the whole case by a writ of certiorari, find that the Circuit Court of Appeals committed error in its construction of the Act to Regulate Commerce and in reversing the District Court, it could reverse the judgments and direct final judgment in favor of the petitioner, as it did in the recent case of *Delk v. St. Louis & San Francisco R. Co.* (220 U. S., 580).

POINTS.

FIRST.

THE COURT HAS UNDOUBTED POWER TO GRANT THE WRIT.

I. That this Court has the power to grant a writ of certiorari in a case such as this, has been expressly decided.

Delk v. St. L. & San. Fr. R. Co., 220 U. S., 580.

That case is on all fours with the present case. It was brought under the Safety Appliance Act, to recover damages sustained by the plaintiff by reason of the failure of the defendant to comply with the requirements of the Act, the plaintiff having made the following averment in his declaration or complaint:

"The defendant negligently, carelessly and recklessly, in open defiance of Chapter 193 of the Acts of Congress of 1893, failed to provide the plaintiff with a safety appliance with which to couple said cars."

The plaintiff's statement of his cause of action "regardless of questions that may have been brought into the suit by the answers or in the course of the subsequent proceedings, must determine the grounds of jurisdiction of the court": *Shulthis vs. McDougal*, 225 U. S. 561, at page 569.

Not only did the Delk case arise under a law of the United States, but the decision turned upon the construction of that law, the point being whether the statute imposed an absolute duty on the Railroad Company to provide a particular kind of couplers. The action was commenced in the State court. There was a diver-

sity of citizenship (as in the case at bar; Rec. pp.5-6), as well as the construction of a Federal statute. The action could have been removed to the Federal court on either or both grounds, although the removal was asked for only on the ground of diversity of citizenship. A judgment was rendered in the Circuit Court in favor of the plaintiff, which, on appeal, was reversed by the Circuit Court of Appeals, *and a new trial ordered.* This was done, on the ground that the Safety Appliance Act did not impose an absolute duty on the carrier to provide a particular kind of automatic couplers, but that the Company was required merely to exercise due care in complying with the general provisions of the Act (p. 586).

On these facts, this Court granted a writ of certiorari, and subsequently reversed the judgment of the Circuit Court of Appeals and affirmed the judgment of the Circuit Court. Obviously, the writ was granted because the construction of a Federal law was involved; otherwise, the case would have had no importance, but would have been merely one of innumerable negligence cases involving no novel principle. This was expressly recognized by this Court, which said (p. 581):

“The declaration contains several counts, but the basis of the plaintiff’s claim is the alleged failure of the railroad company to provide proper automatic couplers as required by the Act of Congress of March 2, 1893, known as the Original Safety Appliance Act.”

Every circumstance in the Delk case is repeated in the present case, with the single exception that the action there was commenced in the State court and was removed to the Federal court, while here it was commenced in the Federal court. That, however, can

make no difference in principle; because, under Section 16 of the Interstate Commerce Act, this action might have been brought in the State court and the defendant could have removed it into the Federal court either on the ground of diversity of citizenship or on the ground that it arose under a law of the United States. Whether the action gets into the Federal court upon the initiative of the plaintiff or of the defendant can make no difference, as the power of this Court to grant a writ of certiorari depends upon the Federal statutes upon the subject as affecting actions pending in the Federal courts. The mere fact that the case had been removed into the Federal court on the ground of diversity of citizenship did not make it one in which the judgment of the Circuit Court of Appeals would be final, if a Federal question was involved, as, in such case, either party would have been entitled, as a matter of right, to a writ of error from this Court, under Section 241 of the Judicial Code.

II. The statutory provisions conferring power upon this Court to grant writs of certiorari are contained in Sections 240 and 262 of the Judicial Code, and are as follows:

"Sec. 240. In any case, civil or criminal, in which the judgment or decree of the Circuit Court of Appeals is made final by the provisions of this Title, it shall be competent for the Supreme Court to require, by certiorari or otherwise, upon the petition of any party thereto, any such case to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court."

"Sec. 262. The Supreme Court and the district courts shall have power to issue writs of

scire facias. The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdiction and agreeable to the usages and principles of law."

Section 240 is a re-enactment of Section 6 of the Act of March 3, 1891, which created the Circuit Courts of Appeal; and Section 262 is a re-enactment of Section 716 of the Revised Statutes (Sec. 6 of the Judiciary Act).

If it should be contended that this Court has no power, in the present case, under Section 240, to grant the writ for the purpose of reviewing the decision of the Circuit Court of Appeals, because the action arose under a law of the United States, and is, therefore, not one in which the decision of the Circuit Court of Appeals is made final, the same must be said of the application in the Delk case. The fact that diversity of citizenship was the sole ground on which removal to the Federal Court was asked, could not have prevented an appeal to this court from a final judgment of the Circuit Court of Appeals, since the action was in fact brought under the Safety Appliance Act. The petition for removal could not limit the grounds of jurisdiction stated in the plaintiff's declaration, so as to prevent a writ of error from this court.

Shulthis vs. McDougal (supra).

If the application in the Delk case was not granted under the power conferred by Section 240, it must have been granted under the power conferred by Section 262. The power of this Court to grant the writ under the latter Section is undoubted, as the case is certainly one within the appellate jurisdiction of the Court, inasmuch as either party would be entitled to sue out a

writ of error, owing to the fact that the construction of a Federal statute is involved.

Judicial Code, Sec. 241.

While this Court exercises the power to issue the writ sparingly, *it is reluctant to place any limitations upon such exercise.*

McClellan v. Carland, 217 U. S., 268, 279.

III. In discussing the power of the Court, under Section 716 of the Revised Statutes (Section 262 of the Judicial Code), Mr. Justice Gray, in *American Construction Co. v. Jacksonville Ry.* (148 U. S., 372), recognized the general power of the Court to issue a writ "in proper cases" (p. 380); and *In Re Tampa Suburban R. Co.* (168 U. S., 583), this Court said (p. 587) that Section 716 "undoubtedly authorized the issue of writs of certiorari in *all* proper cases."

What may constitute a proper case is left to the discretion of the Court. The power is a very broad one, as was recognized *In Re Chetwood* (165 U. S., 443), where it was said (p. 462):

"This writ has not been issued as freely by this Court as by the Court of Queen's Bench in England, and prior to the Act of March 3, 1891, had been *ordinarily* used as an auxiliary process merely; yet, whenever the circumstances imperatively demanded that form of interposition, the writ may be allowed, as at common law, to correct excess of jurisdiction and *in furtherance of justice*. Tidd Pr., 398; Bac. Ab., Certiorari."

This statement was cited with approval in *Whitney v. Dick* (202 U. S., 132, 140).

The above reference to Bacon's abridgement will be found at page 162, under the title, "Certiorari":

"A certiorari is an original writ issuing out

of chancery or the King's Bench, directed in the King's name to the judges or officers of inferior courts, commanding them to return the records of a cause depending before them, to the end that the party may have the *more sure and speedy justice* before him or such other justices as he shall assign to determine the case."

This means, as this Court said in the Tampa Suburban Railroad case (p. 588), that when the writ is sought as between private parties, the general rule is that "it will be granted or denied in the sound discretion of the Court on special cause or ground shown and will be refused *where there is a plain and equally adequate remedy by appeal or otherwise*".

IV. In the case at bar, the petitioner cannot obtain a writ of error from this Court to review the judgment of reversal; and he has no other adequate remedy. If he should go back to the District Court for a new trial, it would not only be possible for the Railroad Company to compel a retrial of all the issues that were once tried before the Commission, at an enormous expenditure of time and money (reflected in the record of 3000 pages, which includes innumerable tables giving summaries of elaborate and detailed research work by experts and professional accountants), but, under the construction placed upon the Act by the Circuit Court of Appeals, limiting the right to recover to two years prior to July 17, 1907, more than 76% of the damages allowed by the Commission would be barred by the Statute of Limitations. Therefore, even if successful in recovering some damages, Mr. Meeker would be obliged to take an appeal to the Circuit Court of Appeals for the purpose of ultimately obtaining the decision of this Court on the question of the Statute of Limitations. On such an appeal, the Circuit Court of

Appeals would necessarily adhere to the decision that it has already rendered and reiterated on the rehearing. If this Court should then conclude that the decision of the Circuit Court of Appeals was erroneous on the question of the Statute of Limitations, it would have to send the case back for a third trial; for all evidence as to the damages sustained during the period prior to the two year period would have been excluded on the second trial. Thus, a third trial would be inevitable. No individual shipper can afford to litigate such questions indefinitely; and it would be a denial of justice to compel the petitioner to pursue such a course when, if his construction of the statute is correct (as was determined by the Commission and by the District Court), the judgment of the Circuit Court of Appeals can be reversed and the judgment of the District Court affirmed upon the writ of certiorari, as was done in the Delk case; and "sure and speedy justice" could be rendered. It is thus obvious, that the granting of the writ in the present case is absolutely essential to the preservation by this Court of its appellate jurisdiction; for, otherwise, the obstacles to a review of the case by this Court ultimately would practically be insurmountable. As it said in *Whitney v. Dick* (202 U. S., 132, 140), "undoubtedly the power exists, and it may sometimes be proper for a court to put an end to the litigation by some short summary process". It is respectfully submitted that if it is ever proper to do that, the case at bar is peculiarly one in which the power of the Court should be exercised.

V. It is no objection to the granting of the writ that the judgment of the Circuit Court of Appeals was one of reversal. That was also the fact in the Delk case, as well as in a more recent case where the writ

was granted by this Court (*Flannelly v. Del. & Hud. Co.*, 225 U. S., 597); and the writ may be issued even before the appeal has been heard in the Circuit Court of Appeals.

The Three Friends, 166 U. S., 1, 5, 49.
Forsyth v. Hammond, 166 U. S., 506, 512.

SECOND.

REASONS WHY THE WRIT SHOULD ISSUE.

Even if there were no question of public interest in this case, the writ should issue in order to ensure summary and speedy justice and preserve the appellate jurisdiction of this Court. But there are questions of vital public interest, involving the construction of important provisions of the Interstate Commerce Act and affecting the interests of shippers and carriers throughout the entire country.

I. The decision of the Circuit Court of Appeals is at variance with the construction placed upon Section 16 and upon the amendatory Act of 1906 by the Circuit Courts of Appeals of other Circuits.

C. B. & Q. Ry. Co. v. Feintuch, 191 Fed. 482, 485-6 (Ninth Cir.);
L. & N. R. R. Co. v. Dickerson, 191 Fed., 705, 711-12 (Sixth Cir.);
Denver v. Rio Gr. R. Co. v. Baer Bros. Mercantile Co., 209 Fed., 577 (Eighth Cir.);
National Pole Co. v. Ch. & N. W. Ry. Co. (Seventh Cir.), not yet reported.

And it is at variance, on the question of the Statute of Limitations, with Conference Ruling Bulletin No. 5, Rule 10 of the Commission:

"Claims filed with the Commission since August 28th, 1907, must have accrued within two years prior to the date when they are filed, otherwise they are barred by the Statute. Claims filed on or before *August 28th, 1907*, are not affected by the two years limitation."

The reason for giving special power to this Court to review judgments of the Circuit Courts of Appeal, by writs of certiorari, even where the decisions of those courts were made final, was to ensure a uniform body of Federal law and practice. That alone, in the present case, would be sufficient ground for granting the writ.

Columbia Watch Co. v. Robbins 148, U. S., 267.

II. That the decision of the Circuit Court of Appeals in the present case was one about which that Court was and still is in serious doubt, is evident from the fact that, in the Jacoby case still pending before it, it has asked for the instructions of this Court upon the vital questions in the present case which it decided adversely to the petitioner (Petition, p. 21).

This, in itself, constitutes a deliberate expression of the Circuit Court of Appeals that the questions involved upon the present application are of exceptional gravity and importance.

Lau Ow Bew, 141 U. S., 583, 587.

III. The decision of the Circuit Court of Appeals is at variance with the uniform practice of the Interstate Commerce Commission, ever since its creation, in the method adopted by it in making its findings and orders (Petition, p. 16). In other words, the construction placed upon the law by the Court below is contrary to the settled construction of the official body

charged with the duty of enforcing it. The construction of such a body is always entitled to the greatest consideration.

Cohens v. Virginia, 6 Wheat., 264.

And when it has been long continued, the Courts will recognize it as conclusive.

U. S. v. Hill, 120 U. S., 169, 180;

Robertson v. Downing, 127 U. S., 607, 613;

U. S. v. Alabama, 142 U. S., 615, 621.

IV. The construction placed upon the Act in this case by the Circuit Court of Appeals nullifies the provisions of Section 16 of the Interstate Commerce Act, that the findings and order of the Commission shall be *prima facie* evidence in an action against a carrier to collect the damages sustained by the violation of the statute. No evidence was submitted on the trial of this case by the Railway Company, after the plaintiff had offered in evidence the findings and order of the Commission; and yet, the Circuit Court of Appeals has held that these findings and order did not make out a *prima facie* case on which the plaintiff was entitled to judgment.

V. The Interstate Commerce Act was passed to protect shippers, by bringing common carriers under the supervision and regulation of a Commission, which should have power to hear and determine complaints and award damages. As part of the scheme, it was expected that the grievances and wrongs of the shippers could be righted by an expert body summarily and without the formalities, technicalities and expense involved in an action at law. The Act was certainly not intended to throw additional obstacles and difficulties in the way of the shipper. But the decision of the

Circuit Court of Appeals in the present case leaves the shipper in worse plight than he was in under the common law. In the case of unreasonable rates, for instance (at least 85% of the petitioner's claims depends upon a finding that the rates were unreasonable), the fact and the extent of the excessive charge must be found and an award of damages made by the Commission before resort can be had to the Courts.

Mitchell Coal Co. v. Penn. R. R. Co., 230 U. S., 247.

But, under the decision of the Circuit Court of Appeals, in the case at bar, the findings and order are without any probative force; because, although made in such manner that the decision of the Commission is entirely clear, yet they are not technically in proper legal form, although the Act nowhere prescribes a particular form.

VI. The Circuit Court of Appeals held that the finding of damages by the Commission was not a finding of fact but a mere conclusion of law, and, therefore, not sufficient to justify a verdict by the jury, even though no evidence to the contrary was given by the defendant. The Court held that this finding of the Commission was a conclusion of law, because the Commission wrongly assumed that the difference between the unreasonable rate and the reasonable rate represented the damages sustained by the shipper.

1. It is respectfully submitted that the finding was one of fact and not of law; and the Court completely ignored the significant fact, that the evidence before the Commission, on which it made its finding, was not offered on the trial of the action. Consequently, the finding of damages may have been supported by other evidence, on which

the Commission relied. The mere fact that the amount represented the difference between the excessive charge and a reasonable charge does not preclude the possibility that there may have been other evidence bearing on the question, justifying such conclusion.

2. It would have been entirely proper, however, for the Commission to base a finding of the amount of damages upon the difference between the excessive charge and the charge which it considered to be reasonable.

National Pole Co. v. Ch. & N. W. Ry. Co. (Seventh Circuit), not yet reported;
 Texas etc. Ry. v. The Abilene Cotton Oil Co.,
 204 U. S., 425, 436;
 Southern Ry. Co. v. Tift, 206 U. S., 440.
 Mitchell Coal Co. vs. P. R. R. 230 U. S. 247,
 264.

In the National Pole Co. case, the Court quoted with approval what this Court had said in the Mitchell case at page 264:

"Since the Commission is charged with the duty of determining whether the practice was so unreasonable as to be a violation of the law, the plaintiff must, as a condition of his right to succeed, produce an order from the Commission that the practice or the rate was thus unreasonable and therefore illegal and prohibited. * * * The courts can then apply that law, and, measuring what has been charged by what the Commission says should have been charged, can award damages to the extent of the injuries occasioned by the payment of the allowance found to be unreasonable and unlawful."

In the Abilene Cotton case, this Court said (p. 436):

"It is also beyond controversy that where a carrier accepted goods without payment of the cost of carriage or an agreement as to the price to be paid, and made an unreasonable exaction as a condition of the delivery of the goods, an action could be maintained to recover the excess over a reasonable charge."

In *Southern Ry. Co. v. Tift*, the Railway Company filed advanced rates on lumber, and a suit was brought to enjoin the carrier from putting the rates into effect. The Court declined to grant the injunction, and the advanced rates became effective and were paid by complainant. The Court held the bill until the plaintiffs applied to the Interstate Commerce Commission to have the advanced rates declared unreasonable. An order was made by the Commission, declaring the old rates reasonable and the advanced rates unreasonable; and the Circuit Court then referred the case to a Master to ascertain "the sum total of the increase in rates paid by each of the complainants and other members of the Georgia Sawmill Association to either or all of the defendant companies since the rate went into effect, to the end of the litigation". Commenting upon the practice, this Court, at the close of its opinion, said (206 U. S., 440):

"The objection that the reference is too broad is not of substance. What the court may award upon the coming in of the report of the Master, we cannot know. *Presumably, it will make the reparation adequate for the injury, and award only the difference on the old rate and to those who are parties to the cause.*"

3. While the Circuit Court of Appeals in the present case recognized that the rule just stated existed at common law, it held that this rule had been changed by the Interstate Commerce Act. In other words, it

disregarded the familiar principle that statutes in derogation of the common law are to be strictly construed and that no change in the common law will be presumed unless the intention to make the change is clearly expressed.

Shaw v. Railroad Co., 101 U. S., 557, 565.

The Court thus necessarily reached the astonishing conclusion, that the Act was intended to throw a heavier burden upon the shipper than existed at common law, in the matter of proving his damages. But this Court evidently entertains quite a different view, as is evident from many of its decisions; and, in the very recent case of *Mitchell Coal Co. v. Penna. R. R. Co.* (230 U. S., 247), it cited with approval (p. 260) two decisions of the Commission, in which damages amounting to the difference between the rates paid and the reasonable rates as fixed by the Commission were awarded, as a matter of course.

VII. The Statute of Limitations.

The Interstate Commerce Act was amended by the Act of June 29, 1906, so as to read as follows:

“All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrued, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the Circuit Court within one year from the date of the order, and not after: *Provided, that claims accrued prior to the passage of this Act may be presented within one year.*”

The first claim against the respondent was presented to the Commission on July 17, 1907, that is, within one year after the Act took effect, which was August 28, 1906.

L. & N. R. Co. v. Dickerson, 191 Fed. 705, 711, (C. C. A.).

Phillips Co. v. Grand Trunk Ry. Co., 195 Fed. 12, 19, (C. C. A.).

It had been laid down as a rule by the Commission (Conference Ruling, Bulletin No. 5, Rule 10) and recognized by the Courts, that any claim which had accrued at the time of the passage of the Act could be enforced, if presented within one year thereafter. In July, 1907, the petitioner had claims against the Railway Company dating back to 1901, and, under existing statutes, those claims were not barred when the amendment of 1906 took effect nor when the claim was filed with the Commission; and yet the Circuit Court of Appeals has held, in this case, that all claims more than two years old were cut off by this amendment. In that conclusion, it clearly disregarded the well-settled principle, that a statute of limitations is unconstitutional if it does not permit a reasonable time for enforcing an existing claim.

Cooley on Constitutional Limitations, (7th Ed., 523);

Sohn v. Waterson, 17 Wall., 596;

Terry v. Anderson, 95 U. S., 628.

Union Pac. R. Co. v. Laramie &c., 231 U. S., 190, 199.

And it also disregarded the plain intent and meaning of the statute which had previously been placed upon it by the Commission and the courts.

VIII. Attorney's fees.

An important question, constantly arising under the Interstate Commerce Act, is involved in the present cases, namely, the awarding of attorney's fees.

The District Judge, in each case, on evidence given of the services, awarded \$10,000 for services before the Commission, and \$2500 for services in the action. Counsel for the Railway Company contended, in the Circuit Court of Appeals, that the District Court had no power to allow for services in the proceedings before the Commission. This question was not passed upon by the Circuit Court of Appeals, owing to its reversal of the judgment on other grounds.

The contention of the petitioner is that, under Section 8 of the Act, in every case where damages are awarded, the carrier is made liable for an attorney's fee to be fixed by the Court. This power may be exercised by the court at any time, whether an action is pending or not.

United States v. Bashaw, 50 Fed., 749 (C. C. A.).

If it is not fixed prior to the trial of the action provided for by Section 16, the court may then fix the amount at the same time that it fixes the fee under Section 16. On the respondent's contention, a carrier could always evade the liability under Section 8, by simply declining to obey the order of the Commission awarding damages, and thus compelling the shipper to bring an action under Section 16, where the power of the court would be limited to fixing a fee for services in the action. It is of great importance that this point should be decided, as shippers would be reluctant to institute a proceeding before the Commission, if the entire burden of expense were thrown upon them, contrary to the intention of the statute.

Seaboard Air Line v. Seegers, 207 U. S., 73, 77-8.

IX. The importance to the public of the questions

involved in the present case requires no special emphasis, in view of what has already been said. In an administrative law, having the wide-spread and far-reaching effects of the Interstate Commerce Act, there should be nothing left in doubt, so far as the courts have the power to aid the Commission; and where the doubt is raised by a judicial decision, contrary to the understanding and long settled practice of the Commission, it is particularly desirable that it should be removed without delay. The Commission may make regulations and lay down rules for the guidance of carriers and shippers; but the only certainty that the law will be complied with rests in the power conferred upon the shippers to obtain speedy and inexpensive redress in case the carriers disregard the duties which the law imposes upon them. If the Circuit Court of Appeals is correct in the conclusion reached by it in the present case, the law has clearly failed to give the protection to shippers which Congress obviously intended to confer, and it should be amended without delay.

WILLIAM A. GLASGOW, JR.,
JOHN A. GABVER,
Counsel for Petitioner.

Washington, March, 1914.

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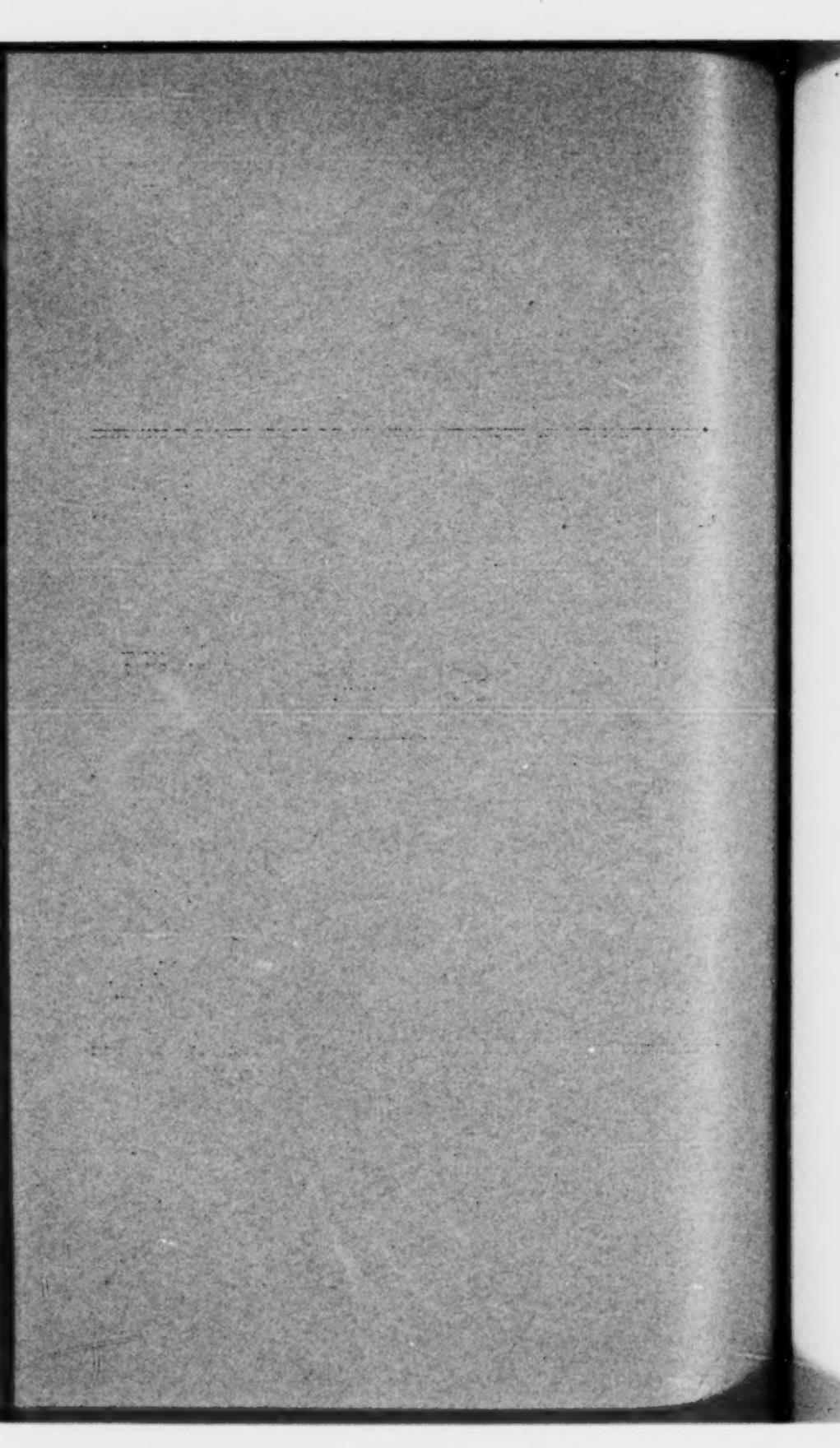
In the Supreme Court of the United States.

OCTOBER TERM, 1913.

**IN THE MATTER OF THE PETITION OF HENRY
E. MEKKER.**

**BRIEF FOR INTERSTATE COMMERCE COMMISSION IN
SUPPORT OF APPLICATION FOR WRITS OF CERTIO-
RARI TO THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE THIRD CIRCUIT.**

JOSEPH W. FOLK,
CHARLES W. NEEDHAM,
Counsel for Interstate Commerce Commission.



In the Supreme Court of the United States.

OCTOBER TERM, 1913.

IN THE MATTER OF THE PETITION OF HENRY E.
MEEKER.

BRIEF FOR INTERSTATE COMMERCE COMMISSION IN
SUPPORT OF APPLICATION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE THIRD CIRCUIT.

STATEMENT.

The Interstate Commerce Commission begs leave to file this brief in support of the petition for writs of certiorari above set forth.

The Commission takes this action because of the embarrassment it would labor under in carrying out the provisions of the act to regulate commerce unless the questions decided by the opinion of the Circuit Court of Appeals of the Third Circuit in these cases are speedily reviewed by this court, and a harmonious and correct conclusion as to the meaning of the act to regulate commerce is established by the decision of this court.

I.

In its first opinion in these cases the Circuit Court of Appeals of the Third Circuit, at page 20 (reaffirmed in the second opinion), says:

As to these documents thus admitted in evidence, it is apparent that the requirement of section 14 that "in case damages are awarded such report shall include the findings of fact on which the award is made," has not been complied with by any express findings of fact in the supplemental report of May 7, 1912, in which the award of damages against the defendant is made; that such findings of fact, if any, must be looked for in the voluminous pages of the original report filed June 8, 1911, to which reference is made in the supplemental report; and that in said original report there are no findings of fact as such, and they must be gathered, if gathered at all, from a mass of recited evidence, statements, opinions, and conclusions of the Commission, all of which were irrelevant to an award of actual pecuniary damages.

At page 17 of its first opinion (reaffirmed) the court said:

The imperative command of section 14 that, in case damages are awarded, such report shall include the findings of fact on which the award is made, evidently contemplated a distinct enumeration of such findings by the Commission with reference to their proposed use in a jury trial.

The uniform construction of section 14 by this Commission in the discharge of its duties has not been

in accordance with this conclusion of the Third Circuit Court of Appeals. Under section 14 the Commission is required "whenever an investigation shall be made" by it, "to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises; and in case damages are awarded such report shall *include the findings of fact on which the award is made.*"

The Commission has never construed this section of the act to require it to make "a distinct enumeration of such findings," but that the findings of fact of the Commission should be included in its report along with its conclusions and decisions. If, therefore, the decision of the Circuit Court of Appeals of the Third Circuit is correct, it will require an entire reversal of the practice of the Commission in the form of its reports, and indeed might render the reports heretofore made in cases of this character of doubtful evidential value.

II.

In its first opinion the Third Circuit Court of Appeals, at page 27 (reaffirmed in its second opinion), also takes the position that "the difference between what is found by the Commission to be the unreasonable tariff rate, and that fixed as a reasonable one," can not "be made the measure of the damage that the plaintiff has suffered," but that there must be additional proof before the court of some other actual damage; and at page 22 of its

first opinion (reaffirmed in the second opinion) the learned court says:

The injustice must be apparent of permitting an individual shipper, after procuring upon its own complaint a reduction of rate for the future, in the interest of the public generally, to secure for himself, by way of reparation, the difference between the new and the old rate which has already been charged to and paid by the consumer.

This conclusion of the Circuit Court of Appeals as to the measure of damage to govern the award of reparation to a complainant who has been charged an unreasonable rate is in conflict with the uniform construction put upon the act by the Commission since its creation. It is also in conflict with the opinions of the Circuit Court of Appeals of several other circuits, and is not in accord with the opinions of this court wherein the measure of damage used by the Commission has been cited with approval. The present conclusion of the Circuit Court of Appeals for the Third Circuit upsets the established rule which has heretofore governed the Commission, thus leaving the matter in such confusion as will embarrass the Commission in its effort to carry out the duties imposed upon it under the act to regulate commerce.

III.

With reference to the statute of limitations the Circuit Court of Appeals for the Third District held that "the Commission in this case had no jurisdiction to entertain a claim of the shipper accruing prior to

July 7, 1905," the date at which the complaint was filed in this case before the Commission. There was no amendment to the act prior to the amendment of 1906, at which time section 16 was amended to read as follows:

All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the circuit court, or State court, within one year from the date of the order, and not after: *Provided*, That claims accrued prior to the passage of this act may be presented within one year.

The construction placed upon this limitation by the Commission, and which it has consistently enforced, is found in its conference ruling, Bulletin No. 5, Rule 10, as follows:

Claims filed with the Commission since August 28, 1907, must have accrued within two years prior to the date when they are filed; otherwise they are barred by the statute. Claims filed on or before August 28, 1907, are not affected by the two years' limitation.

This construction of the statute of limitations by the Commission, which has been enforced in a number of cases before it, has been approved by the Circuit Court of Appeals for the Sixth Circuit, and by this court in the case of *Great Northern Ry. Co. v. United States*, 208 U. S., 452, 468.

It is of grave importance that the act to regulate commerce should be finally and clearly construed by this court in order that the rights of litigants before the Commission may be definitely determined. We therefore respectfully submit that not only the interest of shippers demands an expeditious review of the decision of the Circuit Court of Appeals of the Third Circuit above referred to, but that such course is necessary in order that the Commission shall properly perform the work which it is required to do under the act to regulate commerce.

JOSEPH W. FOLK,

CHARLES W. NEEDHAM.

Counsel for Interstate Commerce Commission.





Supreme Court of the United States,

OCTOBER TERM, 1914.

HENRY E. MEEKER, surviving partner
of the firm of Meeker & Co.,
Petitioner,

AGAINST

LEHIGH VALLEY RAILROAD COMPANY,
Respondent.

(No. 434)

HENRY E. MEEKER,
Petitioner,

AGAINST

LEHIGH VALLEY RAILROAD COMPANY,
Respondent.

(No. 435)

Brief for Petitioner,
in reply.

It is believed that the points which the respondent's counsel attempt to make in their brief have been fully met in the petitioner's original brief. It may, however, be helpful to the Court to direct its attention to a few of the statements made and arguments advanced in the respondent's brief.

Statement of Fact.

I. It is noteworthy that respondent concedes (brief, p. 8) that "in making the supplemental order (order of reparation) the Commission *sought to comply* with Section 16."

The Commission at least meant well, and did not intend to mislead the petitioner or to do a vain thing.

II. In attempting to summarize the pleadings, the statement is twice made (brief, p. 10), that the petitioner alleged that it was charged higher rates than the Lehigh Valley Coal Company, and that if Meeker & Co. had received the same treatment as that Company, they "would have saved" the sum for which judgment was demanded.

Counsel's zeal has lead them to an inference or "conclusion" rather than to the statement of a fact. What the petitioner did allege was (Record, p. 6), that, by the discrimination in favor of the Lehigh Valley Coal Company, the defendant "unlawfully and unjustly exacted from the petitioner" the sum claimed.

P O I N T S .

FIRST.

Respondent's First Point.

I. While setting forth the findings of the discrimination and excessive rates (brief, p. 5), the respondent contends (brief, pp. 25, 27, 35) that these were not findings of fact at all but mere "conclusions", unsupported by any findings of fact.

This contention is completely disposed of in the Fourth Point of respondent's brief, where it is argued that Section 16

is unconstitutional, because it makes the findings of the Commission *prima facie* evidence. Thus, these findings which, for the sake of the argument in the First and Second Points, are slightly referred to as conclusions, are, in the Fourth Point, brought forward as findings of fact upon which the jury should have been allowed to pass! Language could not be more explicit than that employed by respondent's counsel on this point, which is as follows (brief, p. 57) :

"The issues of fact which the Commission and Congress intended to preserve for trial by jury, are the issues : (a) Has the carrier committed a wrong whereby the shipper has sustained injury? (b) If so, to what amount of damages does the fact and nature of the injuries entitle the shipper?"

As pointed out in our original brief (p. 48), the Court below made the same admission, after it had assumed that the award of damages was a conclusion of law and not a finding of fact.

II. Equally vain is the attempt to argue that there was no evidence before the Commission on which the finding of discrimination could be based. If respondent's counsel desired to make that contention, they should have put in evidence the record before the Commission. They will not be permitted to argue that there was no evidence to support the finding even if it should be assumed, for the sake of the argument, that the Commission, in its opinion, did not see fit to refer to the evidence, or gave an erroneous reason for its conclusion. A judgment may be sustained on grounds other than those relied upon by the lower court.

Ostrander v. Hart, 130 N. Y., 406, 413 ;
Smiley v. Barker, 83 Fed., 684, 687 ;
Gibson v. Luther, 196 Fed., 203, 205.

In the absence of the record, an appellate tribunal will certainly not assume the non-existence of a fact in that record for

the purpose of reversing the judgment. The opinion of the Commission, however, clearly shows that there was evidence sufficient to justify their conclusion. The Commission found that the Lehigh Valley Coal Company was a mere appendage of the Railroad Company (record, pp. 22-23, 46), so that anything done by the Coal Company was, in reality, done by the Railroad Company.

III. The extent to which counsel allowed themselves to be carried in endeavoring to create the impression that there was no evidence to support the finding of discrimination is seen in their statement (brief, p. 15) that "there is nothing to show that *any* of the coal purchased by the Lehigh Valley Coal Company was ever shipped to Perth Amboy (the tide-water point)." The Commission found otherwise, as it said (Record, p. 46) :

"The proportion of the total tonnage from the anthracite field shipped by the Lehigh Valley Coal Company does not appear, but it is of record that it ships about 95% of the coal to tidewater."

IV. Only a case of desperation would have led counsel to advance the argument (brief, p. 23), that the Commission did not find that the rate charged subsequent to August, 1901, and prior to the date of their report, was excessive, but that the finding made referred only to existing conditions.

The issue raised by the pleadings comprised the entire period; and the report of the Commission was clearly intended to cover that period, as is evident not only from its discussion of the facts, but in the award of reparation. This was the view taken by the Court below (R., p. 115).

SECOND.**Respondent's Second Point.**

Respondent's Second Point is merely a discussion of the general question of damages. It is not a consideration of the question whether the findings of damage made by the Commission constituted *prima facie* evidence, under Section 16. The International Coal case is relied upon, as it was in the Court below; but, as pointed out in our original brief (pp. 24, 32), it is not in point, because it was an action at common law and not under Section 16, which expressly defines what shall constitute *prima facie* evidence.

THIRD.**Respondent's Third Point.**

The contention that the admission of the reports of the Commission constituted prejudicial error, because the reports contained matter irrelevant to the issues, is without merit; because, on the evidence properly before the jury, the Court would have been obliged to set aside a verdict in favor of the defendant. In other words, the verdict would have had to be in favor of the plaintiff, even if the evidence objected to had been excluded. Had the defendant presented competent evidence in support of its defense, so as to entitle it to go to the jury on the issues, it might possibly have been in position to complain of the admission of irrelevant matter; but not having done so, it is in no position to complain.

FOURTH.

Respondent's Fourth Point.

In their Fourth Point, counsel for the respondent contend that Section 16 is unconstitutional because it deprives the carrier of its right to a trial by jury. Nearly one-fourth of the respondent's entire argument is devoted to this point, which is certainly an indication that counsel thoroughly appreciated the weakness of their other contentions.

If Section 16 should be held unconstitutional, the effect would be to rob the entire Act of all its vitality, so far as the rights of shippers are concerned, and to make their lot much more precarious than it was under the common law. For, wherever unreasonable rates were complained of, the shippers would be obliged, under the decisions of this Court, to proceed, in the first instance, before the Commission, and obtain the decision of that tribunal on the question ; and, having been put to that trouble and expense, they would find that it had all been in vain, and that they must proceed with their action in court just as though no finding had been made by the Commission. It is late in the day to make such an attack upon the statute ; and our legislative bodies would, indeed, be impotent if they could not even prescribe rules of evidence.

FIFTH.

Respondent's Fifth and Sixth Points.

In these Points, respondent seeks to sustain the ruling made by the Court below on the question of the Statute of Limitations.

I. Where the shipper is required or chooses to complain to the Commission in the first instance, before commencing an

action, the limitation prescribed in Section 16 is controlling and applies not only to the proceeding before the Commission, but to the subsequent action following the award of the Commission. If, therefore, the claim is not barred by the provisions of Section 16 at the time of filing the complaint with the Commission, it cannot be barred by any subsequent lapse of time, provided the action is commenced "within one year from the date of the order" of the Commission. Consequently, neither the six year statute of Pennsylvania, nor the five year statute prescribed by Section 1047 of the Revised Statutes, was applicable after the amendment of Section 16, in 1906. Indeed, Section 1047 was never applicable to an action by the shipper under Section 16 to recover damages, as such an action is not one to recover a penalty.

Lehigh Valley R. Co. v. Clark, 207 Fed., 717, 731.
Pennsylvania Railroad Co. v. International Coal
Co., 230 U. S., 184, 199-200.

II. There is no ambiguity in the amendment of 1906 which justifies a resort to the debate in Congress to ascertain what was intended.

Pennsylvania Railroad Co. v. International Coal
Company, 230 U. S., 184, 199.

But, on the record relied upon by respondent's counsel, it is very evident that Congress meant exactly what it said, in allowing claims that had previously accrued, even if more than two years old, to be presented within a year after the Act took effect. The telegram relied upon as showing a contrary intention is thus set forth in the respondent's brief (bottom of p. 85) :

"Cattlemen's claims for reparation have been accruing; three (*sic*) years limitation clause by Hepburn Bill possibly bars prior two years; insert amendment allowing one year to file accrued claims before Commission."

Counsel were so uncertain as to the meaning of this telegram, that they were obliged to resort to the inevitable "sic." That is because they chose to punctuate the telegram in a way to suit themselves. Telegrams, when received, bear no punctuation marks; and the manner in which this particular telegram should have been punctuated and read, so as to dispose of the "sic", is as follows:

"Cattlemen's claims for reparation have been accruing three years. Limitation clause by Hepburn Bill possibly bars prior two years. Insert amendment allowing one year to file accrued claims before Commission."

In other words, the telegram, properly read, clearly shows the intention to permit claims more than two years old (in that case three years) to be filed, if they were presented within a year after the Act took effect.

III. The case of Louisville & Nashville R. R. Co. v. Dicker-
son, 191 Fed., 705, has been repeatedly misconstrued in the
respondent's brief (pp. 80-81, 83). In that case, claims accruing
prior to the passage of the Act were presented to the
Commission within two years after their accrual, but
more than a year after the passage of the Act. Both the
Commission and the Court very properly held that the
proviso, permitting accrued claims to be presented within a
year, did not cut down the two years allowed for the presen-
tation of claims, whether they accrued before or after the
passage of the Act. This decision was not only entirely con-
sistent with the previous interpretation of the statute by the
Commission, but the Court took pains to approve specifically
the Commission's interpretation, as is shown by the quotation
from the opinion at the bottom of page 83 in the respondent's
brief.

IV. When Congress expressly provided that existing
claims might be presented within one year after the passage

of the Act, it clearly intended that the shipper should have a year and not ten months in which to file his claim. The construction contended for by the respondent would defeat the legislative intent, as the effect of the Joint Resolution was to make the amendment effective only on the date fixed, that is, sixty days after the passage of the Act. There was no valid amendment in force until that date. If it should be claimed that the amendment became effective on June 29, 1906, the date of the original passage of the Act, the effect was certainly suspended the following day, by the passage of the Joint Resolution, and the result was precisely the same as if the original Act had provided that it should not become effective until sixty days thereafter.

SIXTH.

Counsel fees.

No serious attempt has been made to meet the argument contained in our original brief (p. 59), on the award of counsel fees. To characterize them as invalid and excessive is not to show that they are so.

SEVENTH.

Reparation as a "judicial preference or rebate."

A prejudicial atmosphere is sought to be thrown about these cases by referring slightly to an award of reparation as constituting a judicial preference, contrary to the spirit of

the Act. It is argued (p. 42) that the published rate established at any one time is the only lawful rate, and that, since this rate is the same for all shippers, a shipper in fact suffers no damage, although the Commission may afterwards find that the rate was unreasonably high. The mere publication of a rate does not, however, make it lawful; and this kind of reasoning necessarily leads to the conclusion that a shipper should never recover damages for excessive charges, since all shippers paid such charges and presumably were reimbursed by the consumers. The provisions of the Act authorizing the recovery of damages in such cases must, consequently, be disregarded.

To call an award of reparation a judicial preference or rebate is a mere bit of rhetoric. The remedy is open to all shippers who are willing to insist upon their rights; and the very fact that some shippers are willing to go to this trouble and expense is in itself a powerful influence in protecting small shippers who may find it cheaper to acquiesce in extortionate rates rather than litigate the question before the Commission and the courts. If some shippers insist upon their rights, all shippers are more likely to be secured in the enjoyment of their rights.

Washington, October 13, 1914.

WILLIAM A. GLASGOW, JR.,

JOHN A. GARVER,

Counsel for Petitioner.

Office Supreme Court, U. S.
FILED
OCT 14 1914
JAMES D. MAHER
CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1914.

No. 434.

HENRY E. MEEKER, SURVIVING PARTNER OF THE
FIRM OF MEEKER & CO., PETITIONER,

v.

LEHIGH VALLEY RAILROAD COMPANY, RESPONDENT.

No. 435.

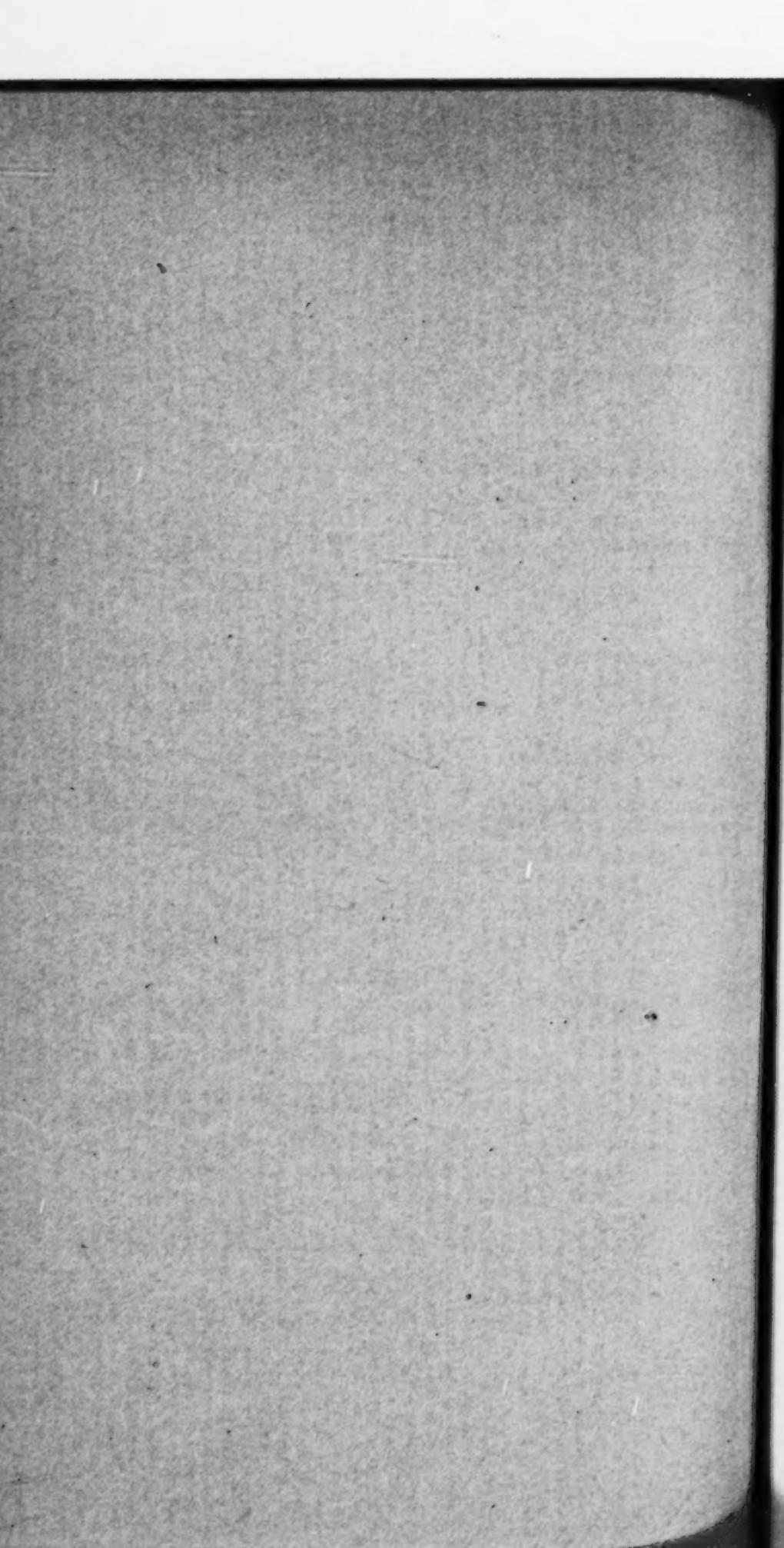
HENRY E. MEEKER, PETITIONER,

v.

LEHIGH VALLEY RAILROAD COMPANY, RESPONDENT.

BRIEF FOR THE PETITIONER SUBMITTED ON BEHALF
OF THE INTERSTATE COMMERCE COMMISSION.

JOSEPH W. FOLK,
CHARLES W. NEEDHAM,
Counsel for the Commission.



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In the Supreme Court of the United States.

COURT TERM, 1914.

HENRY E. MEEKER, SURVIVING PARTNER OF the firm of Meeker & Co., petitioner,	No. 434.
v. LEHIGH VALLEY RAILROAD COMPANY, re- spondent.	
HENRY E. MEEKER, PETITIONER, v. LEHIGH VALLEY RAILROAD COMPANY, respondent.	No. 435.

*CERTIORARI TO REVIEW JUDGMENT OF REVERSAL BY THE
UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
THIRD CIRCUIT.*

BRIEF SUBMITTED BY THE INTERSTATE COMMERCE COMMISSION.

These cases involve questions of law in which the Interstate Commerce Commission is directly interested. They affect procedure before the Commission and determine the status and evidential value of the Commission's reports and orders granting reparation to shippers in interstate commerce who

have been injured by violations of the provisions of the act to regulate commerce by interstate carriers.

QUESTIONS OF LAW.

1. In cases where damages are awarded by the Commission, what "findings of fact" must be included in the report of the Commission and how must these findings be stated?

2. Where a carrier does not comply with an order of the Commission for the payment of money, and suit is brought in the District Courts of the United States "for the enforcement of" such order, what evidential value do the reports and orders of the Commission have upon the trial of the cause in the District Court—

(a) Where the damages awarded are for the violation of section 2 of the act to regulate commerce?

(b) Where the damages awarded are for charging an unreasonable rate in violation of section 1 of the act?

3. What is the "measure of damages" in each of the foregoing cases (a) and (b)?

STATEMENT OF FACTS.

Henry E. Meeker and Caroline H. Meeker were copartners trading as Meeker & Co., engaged in the business of buying, shipping, and selling anthracite coal. During the pendency of the proceedings before the Commission, Caroline H. Meeker died, and the cause was prosecuted in the name of the

surviving partner. At a later period, Henry H. Meeker carried on the business in his own name, and the second suit was commenced. The firm—and afterwards Meeker—bought coal in what is known as the Wyoming coal region of Pennsylvania, from which point a blanket rate applied to tidewater, Perth Amboy, N. J., over the line of the Lehigh Valley Railroad Co., a distance of approximately 165 miles. They shipped their coal over the railroad and sold it to customers in New York City and vicinity, their place of business being in the city of New York.

On July 17, 1907, Meeker & Co. filed a complaint with the Interstate Commerce Commission (hereinafter referred to as the Commission), in which they alleged—

(1) That the Lehigh Valley Railroad Co. had unlawfully discriminated against them in rates charged upon coal shipped between November 1, 1900, and August 1, 1901; and

(2) That the railroad company had, subsequent to August 1, 1901, and prior to the filing of the complaint, charged them unreasonable and excessive rates for the transportation of coal to Perth Amboy.

The complaint asked the Commission to determine—

(1) Whether the complainants had been unduly discriminated against prior to August 1, 1901;

(2) Whether the rates charged since August 1, 1901, were unreasonable; and

(3) If the rates so charged were unreasonable, to fix the reasonable rates that ought to have been charged complainants, and which should be charged in the future.

The complaint then asked for reparation for damages sustained—

- (1) On account of the undue discrimination prior to August 1, 1901; and
- (2) On account of the payment of unreasonable rates subsequent to that date.

Due proceedings were had upon said complaint; a full hearing was accorded to the complainants and the railroad company; a large amount of testimony was taken upon all of the questions involved, and arguments were made and briefs filed by both parties to the controversies. On June 8, 1911, the case, excepting the amount of reparation, was decided by the Commission. A report was filed as required by the act, stating the Commission's conclusions together with its decision and an order directing the railroad company to cease and desist from charging certain specified rates, "which said rates have been found by the Commission in its said report to be unreasonable," and requiring the carrier to establish, on or before a date named, "and for a period of two years thereafter to maintain and apply to the transportation of anthracite coal, in carloads, from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., rates not in excess of" rates named, "which said rates have been found by the Commission in said report to be reasonable." (Ree., 434, p. 48.)

The report also found that the railroad company from November 1, 1900, to August 1, 1901, had accorded to the Lehigh Valley Coal Co. lower rates than those charged to the complainants for a like and contemporaneous service.

It appears by the report that for some time prior to November 1, 1900, the published rates were currently charged to all shippers, and, under what was known as "the 60 per cent contract," all rate payments were adjusted monthly on the basis of allowing operators 60 per cent of the average price of the highest grade of coal at tidewater, and 40 per cent of this price was the "adjusted" freight rate charged to all shippers. Meeker & Co. received the benefit of the adjusted rates prior to November 1, 1900. At this date a change was proposed increasing the percentage to the operators, thereby lowering the percentage of the adjusted rate. Negotiations went on with the understanding that when the matter was settled the percentage agreed upon should apply from November 1, 1900. The matter was finally settled by increasing the allowance to the operators to 65 per cent. Settlements were then made on this basis from November 1, 1900, with all operators except Meeker & Co. They had paid the published rate, as others had done, but were refused the "adjusted rate." This constituted the ground of the complaint of undue discrimination.

These facts are important in determining the measure of damage to apply upon this case.

From all the evidence and the circumstances of this case the Commission found:

We are of the opinion, and so hold, that complainants have sustained the allegation of unjust discrimination under the second sec-

tion of the act. Reparation, with interest from August 1, 1901, will be awarded on this count. (Record, No. 434, p. 23; 21 I. C. C. Rep., p. 137.)

* * * * *

We are further of opinion that reparation should be awarded upon basis of the rates herein found to be reasonable upon all shipments of coal by complainants from the Wyoming region to Perth Amboy since August 1st, 1901. (Record, No. 434, pp. 47, 48; 21 I. C. C. Rep., p. 163.)

The report then concludes (same pages):

The amount of reparation which should be awarded under our findings in this case cannot be ascertained from the exhibits now on file, and such further proceeding will be had as may be necessary to determine the amount of money due to complainants.

Subsequent hearings were had by the Commission, participated in by both parties, and on May 7, 1912, the Commission filed its supplemental report with specific findings upon the reparation due to the complainant. This report states:

A further hearing has been held, and complainant has presented exhibits showing the total number of tons of each variety of coal shipped and the amount of reparation due on such shipments. These exhibits have been examined by defendant and admitted to be correct. * * *

The exhibits showing details respecting the shipments upon which reparation is

asked are too extensive to be set forth in this report. But inasmuch as the accuracy of the figures in said exhibits respecting the shipments made, freight charges paid, and reparation due, is conceded of record by defendant, we deem it unnecessary to make detailed figures respecting the numerous shipments involved. (Record, No. 434, pp. 11, 12; 23 I. C. C., pp. 480, 482.)

The supplemental report recites:

In our original report we found that the rates charged complainant for the transportation of anthracite coal from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., during the period from November 1, 1900, to August 1, 1901, were unjustly discriminatory, in violation of section 2 of the act, to the extent that they exceeded the rates contemporaneously charged the Lehigh Valley Coal Co. under the contract then in effect between that company and the defendant; and we further found that the rates in effect from August 1, 1901, to July 17, 1907, were unreasonable to the extent that they exceeded rates of \$1.40 per gross ton on prepared sizes, \$1.30 on pea, and \$1.15 on buckwheat. (Record, p. 11; 23 I. C. C., 481.)

The report then states the number of tons of each size shipped by the complainant between November 1, 1900, and August 1, 1901, the amount of charges paid thereon "at the rates found to have been unjustly discriminatory," and finds—

that complainant has been damaged to the extent of the difference between the amount

which he did pay and \$118,979.85, the amount which he would have paid had he been given the benefit of the rates applied by defendant to similar shipments of the Lehigh Valley Coal Co.; and that he is therefore entitled to an award of reparation in the sum of \$11,009.33, with interest thereon from August 1, 1901.

The report then gives like statistics and date regarding the shipments from August 1, 1901, to July 17, 1907, and finds—

that the complainant has been damaged to the extent of the difference between the amount which he did pay and \$626,945.62, the amount which he would have paid at the rates found reasonable, less \$193.20 deducted by stipulation of all parties on account of certain claims already paid: and that he is therefore entitled to an additional award of reparation in the sum of \$58,236.45, with interest, amounting to \$27,750.64 on the individual charges comprising said sum from the dates of payment thereof to September 1, 1911, together with interest on said sum of \$58,236.45 from September 1, 1911.

The foregoing was under the petition filed by Meeker & Co., known as No. 1180 on the Commission's docket. Henry E. Meeker subsequently filed a petition known as No. 3235 on the Commission's docket. The latter case was filed April 13, 1910, and attacked the same rates and asked for reparation to the date of the complaint. For the discussion of the questions involved in this brief

it is sufficient to say that there was a like finding upon this petition specifying the total shipments, payments, etc., and finding—

that he is, therefore, entitled to an award of reparation in the sum of \$10,813.60 with interest amounting to \$1,526.53 upon the individual charges comprising said sum from the dates of payment thereof to September 1, 1911, together with interest on said sum of \$10,813.60 from the 1st day of September, 1911 (pages last referred to).

An order of reparation was entered in case No. 1180, the report being made a part of the order, directing the railroad company—

to pay unto complainant, Henry E. Meeker, on or before the 15th day of July, 1912, the sum of \$11,009.33, with interest thereon at the rate of 6 per cent per annum from the 1st day of August, 1901, as reparation for unjustly discriminatory rates * * * as more fully and at large appears in and by said report of the Commission.

It is further ordered (that they pay the several sums named) as reparation for unreasonable rates charged * * * which rates so charged have been found by this Commission to have been unreasonable, as more fully and at large appears in and by said report of the Commission. (Record, No. 434, p. 13.)

A similar order was entered on the ground of unreasonable rates in case No. 3235. (Record, 434, p. 14.)

The railroad company did not comply with these orders, and in September, 1912, the two actions at bar were commenced against the company in the United States District Court for the Eastern District of Pennsylvania. The railroad company pleaded—

not guilty, and further pleads the bar of the statute of limitations applicable to plaintiff's claim; and for further plea in this behalf the defendant avers that the Interstate Commerce Commission has no jurisdiction to make the findings and order of reparation which the plaintiff seeks to enforce by this proceeding; and further, that there was before the Commission no substantial evidence to sustain said findings and said order.

(Record, No. 434, p. 49.)

Upon the hearing in the District Court, the plaintiff offered in evidence the reports and reparation orders of the Commission, together with proof of noncompliance by the railroad company with the Commission's orders. The District Court, in effect, charged that the reports and orders made a *prima facie* case, and a verdict was rendered in accordance therewith. Judgments were entered on the verdict, and appeal was taken to the Circuit Court of Appeals for the Third District. The Circuit Court of Appeals reversed the judgments on the ground that the reports of the Commission were irregular upon their face, and were not *prima facie* evidence of the ultimate facts set forth in the re-

port, that the plaintiffs had been injured, and the extent of the damage sustained. The Court of Appeals further held the statute of limitations was a bar to recovery by the plaintiff. The cases are brought here on writ of certiorari for review by this court.

ARGUMENT.

I.

Findings of fact on which the award is made.

Section 14 of the act to regulate commerce, after providing that it shall be the duty of the Commission, after an investigation, to make "a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises," adds—

And in case damages are awarded such report shall include the findings of fact on which the award is made.

The learned judge, writing the opinion for the Circuit Court of Appeals for the Third Circuit in these cases, criticizes the "findings of fact" in the report of the Commission. In the first opinion (Record, No. 434, p. 113) he said:

The imperative command of section 14 that in case damages are awarded such report shall include the findings of fact on which the award is made evidently contemplated a distinct enumeration of such find-

ings by the Commission with reference to their proposed use in a jury trial (p. 122). * * * No function of a trial judge in such a case could be more exigent than that of pointing out to a jury, in a case where no separate and distinct findings of fact had been made in the report of the Commission, *what are properly to be considered such findings* (pp. 122, 123).

After referring to the findings in the report and supplemental report, the court says:

As to these documents thus admitted in evidence, it is apparent that the requirement of section 14 * * * *has not been complied with by any express findings of fact in the supplemental report* of May 7, 1912, in which the award of damages against the defendant is made; that such findings of fact, if any, must be looked for in the voluminous pages of the original report filed June 8, 1911, to which reference is made in the supplemental report; *and that in the said original report there are no findings of fact as such*, and they must be gathered, if gathered at all, from a mass of recited evidence, statements, opinions, and conclusions of the Commission, all of which were irrelevant to an award of actual pecuniary damage (p. 124).

In the second opinion (Record, No. 434, p. 133), the learned judge said:

The reparation report of May 7, 1912, *contains no findings of fact * * * and is silent as to the information and evidence*

that may have been adduced before it relevant to that claim (p. 145).

* * * * *

A careful reading of the fifty pages of this report does not disclose any specific findings of fact bearing on the award of reparation other than the undisputed tonnage shipped by complainant. The report is occupied entirely with a discussion of the evidence adduced before it on the charges of discrimination and unreasonableness (p. 146).

In the last opinion, after the rehearing (Record, 434, p. 151), the learned judge said:

In the present case we have the unquestioned finding of the Commission, that the rates charged were unreasonable and that a certain lower rate was reasonable, and the difference between the two was expressly and avowedly awarded as damages to the plaintiff (p. 158).

* * * * *

*It is true that the law makes an exception to the ordinary rule of evidence in such cases by providing that facts stated in the findings and order of the Commission need not again be proved by the plaintiff, the finding and order being made *prima facie* evidence of such facts. Such facts may or may not be relevant to the question of the liability for or the amount of damages claimed. Their evidential value in this respect is for the court and jury trying the case.* * * * If the intent of the legislative mind had been to go further and make

not only the findings of facts and order prima facie evidence of the facts stated, but also the conclusions of the Commission on the facts prima facie evidence of the liability of the defendant for the amount of damages stated in the order, such intent should and would have found expression in the act. * * * If more were wanted, we might refer to the language of section 14, which emphasizes the distinction between the "conclusions" of the Commission and "the findings of fact on which the award is made" (p. 157).

* * * * *

The sixteenth section nowhere says that the report, findings, or order of the Commission are prima facie evidence of the liability of the defendant or of the amount of such liability. It only says * * * that the findings and order of the Commission "shall be prima facie evidence of the facts therein stated," but clearly such facts are not made prima facie evidence of anything.

* * * * *

In view of this it would seem almost an abuse of language to say that the "facts" of which the findings and order of the Commission are prima facie evidence, including the conclusions arrived at by the Commission as to the injury of the plaintiff and the amount of damages sustained. * * * What those damages may be is a question of fact to be determined by the jury, and not a question of law.

The foregoing extracts may be illuminated by reading the discussion upon other questions, particularly the question of measure of damages. It seems fair to conclude, however, that the learned judge held:

- (1) That there must be "a distinct enumeration of" findings.
- (2) That these findings are to be of primary facts upon which the Commission reached its conclusions, but that the provision of section 16 does not include the ultimate facts, namely, that the plaintiff was injured, and the extent of the injury. These ultimate facts, he seems to hold, are not included within the term "findings of fact" which were to make out a *prima facie* case.

This leads to the question, what are "findings of fact" in legal procedure; that is, what is meant by that phrase? For it must be assumed that Congress used the phrase in its ordinary and well-understood signification. Section 649 of the Revised Statutes uses this phrase:

The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury.

This court, speaking through Mr. Justice Miller, and referring to this provision, said:

This special finding has often been considered and described by this court. It is not a mere report of the evidence, but a statement of the ultimate facts on which the law

of the case must determine the rights of the parties, a finding of the propositions of fact which the evidence establishes, and not the evidence on which those ultimate facts are supposed to rest. (*Norris v. Jackson*, 76 U. S., 125, 127; *citing Burr v. Durham Co.*, 1 Wall., 99; *Graham v. Bayne*, 18 Howard, 62.)

The Supreme Court of Alabama, referring to findings of fact, speaking through Haralson, J., said:

A mere setting out of all the evidence in the case, conflicting and undisputed, as appears in the bill of exceptions, and rendering judgment thereon, does not constitute a finding of the issues of fact as required by the statute. The conclusion of the court as to what these facts establish within and responsive to the issues in the cause was what the court was required to find. (*Brock v. L. & N. R. Co.*, 21 Southern Rep., 994.)

The Supreme Court of Wisconsin said:

The term "finding" is universally used by the profession and by the courts as meaning the decision of the trial court upon the facts. (*Williams v. Giblin*, 57 Northwestern Rep., 1111, 1112.)

The Supreme Court of Nevada, referring to an act of that State, speaking through Belnap, J., said:

The findings of fact contemplated by the statute is the written statement of *each issuable fact established by the evidence*. From

these determined facts *the conclusion of law is deduced.* (*Elder v. Frevert*, 3 Pac. Rep., 237, 238.)

The learned judge, speaking for the Circuit Court of Appeals in these cases, recognizes, and expressly states that whether the plaintiff was injured by the carrier's violations of the statute and the amount of damages he has sustained are questions of fact. These questions, with others, were in issue before the Commission—issues raised by the pleadings. The finding that the plaintiff was injured and the extent of the injury were conclusions; and they were conclusions of fact. These conclusions did not constitute the award; the award was based upon and the result of these findings of fact, precisely the same as a judgment of a court is based upon the "findings of fact" made by the court where a jury has been waived, or by a jury when the case is submitted to a jury.

The issues of fact in these cases, whether tried by the Commission or by a court—conceding, as we do not, that the court could try all these questions—are:

- (1) The status and relation of the parties, as shipper and carrier.
- (2) The fact and the amount of the traffic carried.
- (3) The amounts paid by the shipper for the transportation service.
- (4) Whether the charges were unreasonable or unduly discriminatory.

(5) If the charges were unreasonable, what would have been a reasonable charge.

(6) Whether the plaintiff was injured by the payment of unreasonable rates and undue or unreasonably discriminatory charges.

(7) The amount of the damages sustained by the plaintiff as the result of the payment of unreasonable and unduly discriminatory charges.

If these constitute the issues, then the findings of fact must determine each one of the issues raised, and these determinations must be stated as findings, not in any precise words but in clear and legal effect. No other findings are required to be stated. The evidence upon these issues is not to be reported in order that the court or jury may judge whether the findings are correct. This applies to every one of the facts which must be found. All are *ultimate facts*, including the question of injury and the amount of damage sustained. This is clearly the decision of the courts in the cases cited.

Intent of the act.—This interpretation follows from an examination of the intent and purpose of the statute. The main purposes of the act to regulate commerce were to insure reasonable rates, equality of treatment to all shippers under like conditions, and to provide a simple, effective, and inexpensive method of obtaining redress for violations of the law. (*Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U. S., 426, 439; *New York, N. H. & H. R. R. Co. v. Interstate Comm. Comm.*, 200 U. S., 361, 391; *Robinson v. B. & O. R. R. Co.*,

222 U. S., 506, 509; *Mitchell Coal Co. v. Penna. R. R. Co.*, 230 U. S., 247, 257, 258.)

In the report of the Committee on Interstate Commerce of January 18, 1886, through the chairman, Senator Cullom, which is a review of the purposes of the act to regulate commerce, as originally passed by Congress, it is said (p. 214) :

Nor is it proposed to compel any citizen to rely solely upon the Commission recommended by this committee or to debar him from seeking redress from grievances from the judicial tribunals of the United States if he shall prefer to have recourse to them. On the contrary, it is expressly provided that he shall be free to pursue his remedy at common law or *under the statute herein recommended* at his own discretion. It is not proposed to in any manner restrict the choice of remedies now available, but it is proposed to provide *additional means of obtaining redress with much less difficulty and expense* and to render those already existing very much more effective.

This can best be accomplished, it is believed, *by making the reports and recommendations of the Commission prima facie evidence as to the facts found in all cases which it investigates*. This would do more towards placing the shipper upon an equality with the carrier in a legal controversy than anything else that has been suggested, and would to a considerable extent obviate the almost insurmountable difficulties now encountered by the shipper.

With such a change in the rules of evidence, a favorable report by the Commission *would substantially establish the case of the complainant, should judicial proceedings become necessary, as it would lift from his shoulders the burden of proof and transfer it to the carrier.*

The act to regulate commerce confers upon the Commission power to hear *and determine* the complaints of "any person or persons claiming to be damaged by any common carrier subject to the provisions of this act." (See. 9.) This language includes damages for injuries arising from *any* violation of the act; those arising from violations of section 2, as well as violations of section 1.

After hearing, the Commission is to "make an order directing the carrier to pay to the complainant the sum to which he is entitled, on or before a day named." (See. 16.) This a new remedy before a newly constituted tribunal. It determines the liability, and the carrier is in duty bound to pay the award.

But Congress is limited by the constitutional provision requiring trial by jury. No penalties, therefore, are provided for failure to comply with this class of orders, and the Commission is not authorized to issue any writs to compel the performance of any of its orders. For these reasons it was necessary to provide for a court procedure "for the enforcement of an order" for the payment of money (see. 16), not by a proceeding in equity, but a proceeding that would give a jury

trial upon the questions that affected the property rights of the carrier *provided the carrier raised issues to be tried*, and offered evidence in support of its contentions. To meet this constitutional requirement, the case is to be commenced by a "petition setting forth briefly the causes for which he claims damages," and then adds to the requirements for the ordinary declaration or complaint that the petition shall set forth "the order of the Commission in the premises," thus advising the court that there has been a proceeding before the Commission regarding the matter complained of. Following the policy for expediting all cases in court affecting commerce, and casting the burden of the litigation upon the carrier, the act provides that "on the trial of such suit the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated." (See. 16.) Attorney's fees are also allowed in these cases. One can not carefully read the act in reference to the proceedings to be had in court regarding the enforcement of the act and for the recovery of damages for injuries caused by the violations of its provisions, without being impressed that the purpose in the mind of Congress was not only to compel obedience by severe penalties, but also to secure conformity by complete and quick remedies to shippers injured by any violations of the act.

Every act should be construed in the light of circumstances existing at the time the act was passed, and the intent of Congress be gathered from the

objects and purposes in view. (*Louisville & Nashville R. R. Co. v. Mottley*, 219 U. S., 467; *Tex. & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S., 426.)

In determining, therefore, what Congress meant by the use of the legal phrase "findings of fact," we must conclude, in the light of all the authorities, that it was to be a finding of all the *ultimate facts* raised by the pleadings *necessary to an award by the Commission or a judgment thereon by the court*.

The Commission is more than a jury. It finds the facts and also enters judgment thereon, and to its findings and judgment this court has ascribed—

the strength due to the judgments of a tribunal appointed by law and informed by experience. (*Ill. Cent. R. R. v. Int. Comm. Comm.*, 206 U. S., 441, 454.)

When its findings of ultimate facts are presented to the court in these cases, the court and jury have nothing to do but accept them as making a *prima facie* case for the plaintiff, provided always that every essential ultimate fact has been found by the Commission. If the Commission, in its report, has omitted an essential fact—for instance, that the plaintiff was injured, or the amount of the damages—then, of course, the report does not make out a *prima facie* case. But if all the essential facts—*ultimate facts*—are found which are necessary to the determination of the issues raised by a general denial of the plaintiff's complaint, then no further

proof is necessary in the first instance. It is a *prima facie* case.

The purpose of the act is clear. It was to cast upon the carrier the burden of defending a suit which had been necessitated by its failure to comply with the order of the Commission. These are not cases in which technical construction of rules of procedure are to be applied, or in which delays are to be tolerated. These cases are to be expedited and carriers are not to be permitted to interpose mere technical defenses to procedure before the Commission. The substantial rights of the carrier are fully protected. It can interpose any defense that goes to the merits of the controversy, and those defenses may be heard by the court and determined by the jury. But the railroad company is put upon its defense when the report and order containing the findings of the Commission are presented to the trial court.

Prima facie case.—"Prima facie evidence of a fact," says Mr. Justice Story—

is such evidence as, in judgment of law, is sufficient to establish the fact; *and if not rebutted, remains sufficient for the purpose; the jury are bound to consider it in that light*, unless they are invested with authority to disregard the rules of evidence by which the liberty and estate of every citizen are guarded and supported. (*Kelly v. Jackson*, 6 Pet., 622; *Reaffirming Carver v. Jackson*, 4 Pet., 1. See also *United States v. Wig-*

gins, 14 Pet., 344; *Tobacco v. United States*, 97 U. S., 237, 268.) * * *

This virile statement by Mr. Justice Story is in strong contrast with the statement made by the learned judge writing the opinion in the court below, where he says:

In other words, the statute makes the finding or order *prima facie* evidence of certain facts, but it does not make, or attempt to make, such facts *prima facie* evidence of anything.

This court speaks positively upon the question:

The statute gives *prima facie* effect to the findings of the Commission. (Cinn., etc., Ry. Co. v. I. C. C., 206 U. S., 142, 154.)

The findings of the Commission are made by law *prima facie* true. (*Ill. Cent. v. I. C. C.*, 206 U. S., 441, 454; *I. C. C. v. Union Pac.*, 222 U. S. 541, 546.)

In the *Mitchell Coal case* (*supra*), Mr. Justice Lamar, referring to the orders of the Commission, said:

They are quasi judicial and only *prima facie* correct *in so far as they determine the fact and amount of damage*—as to which, since it involves the payment of money and taking of property, the carrier is, by section 16 of the act, given its day in court and the right to a judicial hearing (p. 258).

Findings in the case at bar.—The status and relation of the parties as shipper and carrier, and the points between which the service of carriage was

performed are clearly stated. There are three issues in this class of cases that must be determined by the Commission and upon which its decisions are final, namely:

- (1) Is a discrimination "undue" or "unreasonable"?
- (2) Are the carrier's rates unreasonable?
- (3) If a rate is found by the Commission to be unreasonable, what would have been for a past period, and what will be for a future period, a *reasonable rate*?

All of these questions are for determination by the Commission. (*Texas & Pac. R. R. Co. v. I. C. C.*, 162 U. S., 197; *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U. S., 426; *Interstate Commerce Commission v. Illinois Central Railroad*, 215 U. S., 452, 475; *B. & O. R. R. Co. v. Pitcairne*, 215 U. S., 481; *Interstate Commerce Commission v. D. L. & W. R. Co.*, 220 U. S., 235, 251; *Interstate Commerce Commission v. Union Pacific R. Co.*, 222 U. S., 541, 547; *Interstate Commerce Commission v. L. & N. R. R. Co.*, 227 U. S., 88, 92, 100; *Penna. R. R. Co. v. International Coal Co.*, 230 U. S., 184; *Minnesota Rate Cases*, 230 U. S., 352; *Houston East & West Texas R. Co. et al. v. United States*, 234 U. S., 342; *Intermountain Rate Cases*, 234 U. S., 476.)

The original report is mainly given to a discussion of these questions which fall within the exclusive jurisdiction of the Commission. To be satisfactory to the parties, as well as to state clearly the position of the Commission upon the facts of these

particular cases, an exhaustive opinion is necessary. This report is able and comprehensive, and discusses these questions with great clearness *and states the ultimate facts arrived at by the Commission.* So clearly are these facts stated that the learned judge, writing the opinion for the court below, said:

In the present case we have the unquestioned finding of the Commission, that the rates charged were unreasonable, and that a certain lower rate was reasonable, and the difference between the two was expressly and avowedly awarded as damages to the plaintiff. (Record, 434, p. 158.)

He also concedes that the Commission found that the charges prior to August 1, 1901, were unduly discriminatory. Upon this branch of the case the Commission found:

From the facts disclosed * * * [there] was therefore the equivalent of a readjustment of the freight rates upon the basis of the 65 per cent contract on such coal as was purchased by the Lehigh Valley Coal Co. and shipped to tidewater during the period from November 1, 1900, to August 1, 1901. We are of the opinion, and so hold, that complainants have sustained the allegation of unjust discrimination under the second section of the act. Reparation, with interest from August 1st, 1901, will be awarded on this account. (Record, 434, p. 23.)

This finding seems to be clear and explicit. If more is needed, we have only to turn to the order (p. 13).

*It is ordered, That the defendant * * **
 is hereby authorized and required to pay unto complainant, Henry E. Meeker, on or before the 15th day of July, 1912, the sum of \$11,009.33, with interest thereon at the rate of 6 per cent per annum from the 1st day of August, 1901, as reparation for unjustly discriminatory rates charged for the transportation of anthracite coal from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., *which rates so charged have been found by this Commission to have been unjustly discriminatory*, as more fully and at large appears in and by said report of the Commission.

The original report also expressly finds that by reason of undue discrimination and the charging of unreasonable rates by the Lehigh Valley Railroad, the plaintiff *was injured* and was entitled to reparation or damages for these violations of the act.

In regard to the unreasonable rates charged subsequently to August 1, 1901, the Commission found:

After a careful study of defendant's exhibits relating to tonnage and cost of movement, as well as a painstaking analysis of defendant's voluminous exhibits regarding its past and present financial condition, *we are of opinion, and so find, that defendant's rates for the transportation of coal from the*

Wyoming region in Pennsylvania to Perth Amboy, of \$1.55 per gross ton on prepared sizes, \$1.40 on pea coal, and \$1.20 on buckwheat coal *are unreasonable so far as they exceed \$1.40* on prepared sizes, \$1.30 on pea coal, and \$1.15 on buckwheat. * * *

We are further of opinion that reparation should be awarded on basis of the rates herein found to be reasonable upon all shipments of coal by complainant from the Wyoming region to Perth Amboy since August 1, 1901. (Record, 434, pp. 47, 48.)

This is also repeated in the order.

These ultimate facts, then, are established by the original report. In the supplemental report, concerning the amount of the shipments, it is stated that an exhibit was presented in evidence, "showing the total number of tons of each variety of coal shipped and the amount of reparation due on such shipments," the reparation due being (1) the damages arising from undue discrimination, and (2) damage arising from the charging of unreasonable rates.

These amounts in the exhibits were arrived at by the parties applying the findings and conclusions of the Commission in its original report to the several shipments. These exhibits were examined by the defendant and "*admitted to be correct.*" It was not necessary to set forth these exhibits in the report, any more than it was necessary to give any other evidence *in extenso* upon which the Commission made its findings. These exhibits were pre-

sented as evidence, and their correctness was admitted; and from this evidence the Commission made its findings. These findings in the supplemental report are specific and complete in every particular. They show the number of tons shipped of each size, total amount of freight paid, the amount that should have been charged, and the total damages as to each cause of action. Here, then, we have facts found by the Commission which sustain every allegation of the plaintiff's complaint. Under the authorities it was, we respectfully submit, the duty of the court, *there being no defense interposed by the railroad company*, to charge the jury that upon these facts the plaintiff was entitled to recover the amount awarded by the Commission.

TRIAL BY JURY.

Referring to the position taken by the plaintiff that these reports and orders constituted a *prima facie* case, the learned judge said, in the last opinion:

It is also still more unjust in these cases, because if sustained it practically and substantially makes the award of the Commission not only *prima facie*, but *conclusive* evidence of the plaintiff's case.

* * * * *

Can it be doubted that the parties, therefore, are entitled to a *real* trial by jury so conducted as to accord to them in full measure the enjoyment of their constitutional right? If so, how wide of the truth is the

contention that this right has been enjoyed by the defendant in the present suit ?

* * * * *

Though stated to be *prima facie*, it is really, according to that theory, conclusive as to the injury of the plaintiff and the amount of his damage.

* * * * *

In view of this, it would seem almost an abuse of language to say that the "facts," of which the findings and order of the Commission are *prima facie* evidence, include the conclusions arrived at by the Commission as to the injury of the plaintiff and the amount of the damages sustained.

* * * * *

The argument to the contrary is largely technical, and tends to make a mockery of the right of a jury trial and to defeat the just purposes of the act in that respect. (Record, 434, pp. 158, 159.)

The learned judge seems to overlook the fact that after the plaintiff had made out a *prima facie* case entitling him to a verdict of judgment if no defense was interposed, the railroad company had full opportunity to introduce evidence showing that the plaintiff had not been injured by the discriminatory charges or the unreasonable rates, or that he had not paid the charges or part of the same; that the claim, or any part of it, was barred by the statute of limitations—in fact, the whole field of meritorious defense was open to the railroad. It chose not to introduce any evidence upon the main issues.

The case, therefore, stood upon the *prima facie* case made out by the plaintiff, and it became the duty of the court to charge the jury what verdict it was their duty to render. It is strange reasoning to say that to hold that the findings of the Commission made out a *prima facie* case was equivalent to holding the Commission's findings *conclusive*. In all cases where certain documentary evidence is made *prima facie* evidence of the ultimate facts upon which a judgment may be entered the same result would follow. Take the case of a promissory note or a transcript of the judgment of another court: It is no deprivation of the *right* of trial by jury to say that upon such *prima facie* evidence, without any defense being interposed, it is within the province of the judge to charge the jury that it is their duty, upon such evidence, to find a verdict for the plaintiff. Such instances are very common in courts of justice. Verdicts are rendered under such instructions without leaving the box. It is in no sense a violation of the constitutional right of trial by jury for the legislative branch of the Government to determine what shall be *prima facie* evidence of the facts. This is not conclusive upon the defendant. It simply puts the defendant upon proof; and if he desires to have his defense, if he has any, passed upon by the jury, or, rather, if he desires to have the whole case passed upon by the jury, it is his duty to introduce his evidence and show what meritorious defense he has to the *prima facie* case.

Mr. Justice Lamar said:

As the statute makes its findings *prima facie* correct * * * it will be more convenient to consider the case from the standpoint of the carriers who first insist that the order was void. (*I. C. C. v. Union Pac. R. R.*, *supra*, p. 546.)

It is not "trial by jury" but "*the right* of trial by jury" which the seventh amendment to the Federal Constitution declares "shall be preserved." (*Capital Traction Co. v. Hof*, 174 U. S., 1, 23.) It is not for the trial judge to insist upon a trial by jury when the defendant is before him. It is for the defendant to secure such a trial by offering evidence which tends to rebut some or all of the material facts established by the *prima facie* case.

It is now a settled rule in the courts of the United States that whenever, in the trial of a civil case, it is clear that the state of the evidence is such as not to warrant a verdict for a party, and that if such a verdict were rendered the other party would be entitled to a new trial, it is the right and duty of the judge to direct the jury to find according to the views of the court. This is not a violation of the right of trial by jury. (*Dowditch v. Boston*, 101 U. S., 16, 18; *Coughran v. Bigelow*, 164 U. S., 301, 307.)

Trial by jury is never had where a rule of the court, in actions *ex contractu*, requires in certain cases an affidavit of merits to be filed by the defendant, and it is not filed. The judgment is rendered

upon the sworn complaint of the plaintiff. (*Fidelity, etc., Co. v. United States*, 187 U. S., 315.)

Where action is brought for a sum certain, or which may be rendered certain by computation, judgment for damages may be entered by the court without a writ of inquiry. (*Renner v. Marshall*, 1 Wheaton, 215; *Aurora City v. West*, 7 Wall., 82, 104.)

But where the sum for which judgment should be rendered is uncertain, the rule in the Federal courts is that the damage shall, if either of the parties request it, be assessed by the jury. (*Aurora City v. West, supra*; *Armstrong v. Carson*, 2 Ball, 202.)

Where a jury is empaneled and a *prima facie* case is made out under the law applicable to the case, and the defendant fails to offer any proof in defense upon the merits of the case, and the court has jurisdiction of the subject matter and the parties, "the jury," to quote again the language of Mr. Justice Story, *supra*, "are bound to consider it in that light, unless they are invested with authority to disregard the rule of evidence by which the liberty and estate of every citizen are guarded and supported."

The "right of trial by jury," therefore, is not abridged by an act of Congress providing that certain findings shall constitute *prima facie* evidence of ultimate facts. Whether there shall, in such a case, be a trial by jury *in fact* depends upon the action of the defendant in offering or neglecting to

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offer any testimony by way of defense. It is still a trial by jury if, in such cases, the court instructs the jury that it is their duty to find a verdict for the plaintiff.

MEASURE OF DAMAGES.

There are two distinct causes of action in this case. The first arises under the second section of the act by reason of the giving of discriminatory rates; and the second arises under the first section of the act in charging unreasonable rates.

Damages arising because of discrimination.—There is no general measure of damages that can be applied. The rule is very clearly stated in the Coal cases that damages are to be measured by the injury which a party has sustained as the direct result of the giving of discriminatory rates to other shippers and refusing such rates to the complainant. This injury, of course, must be ascertained by a tribunal having jurisdiction, and must be arrived at by proof of the injury and the extent of it.

As already contended, the court and jury in this case must accept the ultimate findings of the Commission that the plaintiff was injured and the extent of his injury, there being no evidence submitted by the defendant company. It may, however, be contended that the report shows upon its face that the Commission applied a measure of damages not warranted in law. What the Commission did was to allow as damages the difference between the rates paid by the complainant and the

rates allowed to other contemporaneous shippers during the period named. It is conceded that this is not a measure of damage *to be applied in every case*. Every case must depend upon the circumstances of the case as was so clearly stated by Mr. Justice Lamar, speaking for this court in the *International Coal case (supra)*:

The measure of damages was the pecuniary loss inflicted on the plaintiff as the result of the rebate paid. Those damages might be the same as the rebate, or less than the rebate, or many times greater than the rebate; but unless they were proved, they could not be recovered. Whatever they were, they could be recovered, because §8 expressly declares that whenever a carrier did an act prohibited, or failed to do an act required, it should be "*liable to the person injured thereby for the full amount of the damages sustained in consequence of such violation * * * together with reasonable attorney's fee.*"

It was the duty, therefore, of the Commission to inquire into the circumstances attending the discrimination in this case, and ascertain in what manner the complainant was affected by it and the extent of his injury. It "might be the same as the rebate." It might not be. The damages, in all cases, must be the natural and proximate consequences of the act complained of.

The peculiar circumstances outlined in the report show the reasons why the Commission con-

eluded that the damages were the differences between the rates paid by the complainant and the rates allowed to the Lehigh Valley Coal Co. For a long period of time the "adjusted rates" upon coal were fixed under what was known as the 60 per cent contract, herein described. All parties had adjusted their business to that arrangement and expected to receive the benefits of it. In November, 1900, the operators asked for a change in that contract, giving them more favorable terms. That negotiation went on for a considerable period of time before an agreement was reached, the operators continuing to regulate their business in reference to the old conditions with a possibility of some advantage from a new agreement. It was understood that the new agreement should date back to the period when negotiations began. An agreement was reached by which the contract was changed to a 65 per cent contract, thus reducing the adjusted rates 5 per cent. Pursuant to the understanding under which all parties had acted and transacted their business, the company allowed all the operators except the complainant the benefit of the reduced rate. *This benefit was refused to Meeker & Company.* In consideration of all these circumstances, *the fact that their business had been conducted with the expectation of receiving this benefit, and that the prices of coal in New York had been made based upon it,* the Commission found that the amount allowed other operators was, *in*

this case, a proper measure of the complainant's damage.

Whether this 60 per cent contract was lawful or not is a question we have nothing to do with in this case. This was not a suit upon the contract. It was a claim for damages by the only operator who had not received the benefit of the contract. This measure of damages put the operators upon an equality during the period named prior to August 1, 1901. It repairs the injury to the business of Meeker & Co. The damage actually sustained was that impairment of their profits occasioned by fixing the prices of coal in New York and meeting the competition of their competitors on the expectation that the agreement to make the final settlement retroactive to November 1, 1900, would be shared by Meeker & Co., *their business having been conducted upon the understanding that the settlement would be made retroactive*, and the company having carried out that understanding with their competitors. In the opinion of the Commission this was the real measure of damages under the peculiar circumstances of the case.

The Commission, as a tribunal charged with the settlement of these claims, must ascertain the damages under such rules as the Commission adopted. It can not be said that the measure of damages applied in this case is unlawful. It does not violate any rule of law. The court might, it is true, accept some other measure of damages if it had all

the facts before it. But without the facts the measure of damages apparently adopted by the Commission can not affect the *prima facie* value of the report and order as evidence. It is very different from a case where the report shows upon its face that a *rule of law* has been misinterpreted or not enforced. There is no rule of damages that can be applied in all such cases. Therefore it can not be said that, upon the face of the report, the court could draw the conclusion that the Commission erred in the measure of damages which it adopted. If the defendant desired to test this question it could have offered evidence showing the conditions and circumstances of the case and asked the court to apply a different rule of damage, which the court could have done if it had had the evidence before it. But without evidence upon which the court and jury could form an independent judgment as to the damage, the report of the Commission must be accepted as *prima facie* evidence of the amount of the damages sustained by the plaintiff.

Damages occasioned by payment of unreasonable rates.—Injury resulting from the payment of unreasonable rates or, as it was usually designated, overcharging, was recognized at common law. Where the party, in order to get his property, was compelled to pay an unreasonable rate, he could sue and recover damages. The service had been performed, the payment had been made, and the party making the payment could recover the amount of the overcharge. The measure of damages was the

difference between a *reasonable charge* and the amount actually paid.

This company * * * is subject to the same control as private individuals under the same circumstances. It * * * can charge only a reasonable sum for the damage. In the absence of legislative regulation upon the subject *the courts must decide for it, as they do for private persons when controversies arise, what is reasonable.* (Chicago, etc., R. R. Co. v. Iowa, 94 U. S., 155-161.)

At common law, the question whether the charge collected was extortionate or unreasonable was determined by the jury. If the jury found that the charge was extortionate, they then found what would have been the fair and reasonable charge. The difference between these constituted the damage which the injured party was entitled to recover. It is the only general measure of damages which can be applied. It is in fact simply an overcharge. If the payment had not been made, and the carrier brought suit to recover for the service, barring a stipulated agreement, he could only recover what the jury determined was a fair and reasonable charge. If the carrier had extorted a payment greater than was reasonable by refusing to deliver the goods unless payment was made, the party injured could make the payment under protest and sue and recover the difference or the amount of his injury.

The act to regulate commerce does not provide any different measure of damages for the violation of section 1, which makes it the duty of all common carriers to charge "rates that shall be just and reasonable," and declares "every unjust and unreasonable charge for such service prohibited and declared to be unlawful."

Carriers originate their rates and file schedules thereof under section 6. The law makes these rates lawful rates *until they are declared unreasonable by the Commission.* The result is that the carrier must collect and the shipper must pay the published rate. If the rate in a particular case is unjust and unreasonable, the carrier has violated the law, just as at common law the carrier violated the law when he made an extortionate charge. In either case the shipper has his remedy, which is to recover the difference between the unreasonable rate paid and what would have been a reasonable rate, for the services rendered.

But under the act to regulate commerce, the court and jury can not determine the question whether the rate charged and collected was unreasonable, nor can they determine what would have been a reasonable rate. These two questions of fact *must be determined by the Commission.* (*Texas, Etc., Ry. Co. v. Abilene Cotton Oil Co., supra; B. & O. R. R. v. Pitcairn Coal Co., supra; Robinson v. B. & O. R. R. Co., supra; Mitchell Coal Co. v. Penna. R. R. Co., supra; Penna. R. R. Co. v. International Coal Co., supra.*)

The general or fundamental measure of damages in all these cases is, however, the difference between the unreasonable rate paid by the plaintiff and the reasonable rate found by the Commission which ought to have been charged. This measure of damages had been applied by the Commission ever since the enactment authorizing them to grant reparation in such cases. It was the rule applied by the Commission in an order approved by the court in *Baer Bros. v. Denver & R. G. R. R. Co.* (233 U. S. 479).

The marked difference between suits to recover damages because of the charging of unreasonable rates and a suit brought to recover damages occasioned by the charging of discriminatory rates is that in the latter case there is no "measure of damages" that can be laid down applicable to all cases, other than to say "the compensation shall be equal to the injury." As we have already observed, the injury must be proved, and the court will apply to the case a measure that will fit the case; whereas in suits brought to recover damages for an overcharge or the payment of unreasonable rates, there is an established measure of damages which will be applied. We do not contend, of course, that a shipper would be entitled to recover the full measure of damages if he had only paid a part of the freight charge. Take, for instance, a case where the shipper has sold coal f. o. b. at point of origin, freight to be paid by the consignee. He could recover nothing, because he had not paid the unreasonable charge. This does not affect the measure of

damages to be applied where a party has been in fact injured by making payment of the charges. Suppose the shipper sold coal, the consignee to pay half the freight and the shipper paid half. The fundamental measure of damages which would have to be applied would be the difference between the reasonable rate and the unreasonable rate paid. Of this amount the shipper could only recover one-half, that being the extent of his injury. The amount, however, to be paid to the shipper could only be ascertained by first taking the difference between the reasonable rate and the unreasonable rate and giving such proportion of that amount as damages as his payment bore to the total amount of the charge. These conditions do not change the correctness of the general rule of damages which must be applied in all cases of this character.

The learned judge who wrote the opinion in the court below, we submit, confuses the issue by confounding "proof of injury" with "measure of damages." He declares that the *measure of damages* in both classes of cases—under section 1 and section 2—is precisely the same. Quoting the words of Mr. Justice Lamar, "do not support the proposition, that damages can be recovered without proof of what pecuniary loss had been suffered as a result of the discrimination." Judge Gray says:

No more in this case can the difference between what is found by the Commission to be the unreasonable tariff rate and that fixed

as a reasonable one *be made the measure of the damage that the plaintiff has suffered.* (Record, 434, pp. 148, 149.)

In the supplemental opinion, referring to the words in the statute "liable * * * for the full amount of damages sustained," this rather obscure reasoning appears:

What those damages may be is a question of fact to be determined by the jury and not a question of law. * * * This is the measure of damage established by the act itself, and must be conformed to in a case like the present. The language of the eighth section makes the measure of damage therein prescribed applicable to every violation of the act. Nor has the Supreme Court in any case decided otherwise. Its reasoning has to be the measure of damage established by the eighth section, is also applicable to every violation of the act—to one that depends for its legality upon a finding of the Commission as well as to one where such finding is unnecessary. The argument to the contrary is largely technical and tends to make a mockery of the right of a jury trial, and to defeat the just purposes of the act in that respect.

To declare by statutory enactment that a party may recover damages for injuries sustained is not a "measure of damages," as this phrase is used in legal procedure. Of course the party must prove his damage, and he can only recover to the extent of his injury; but a "rule of damages" is for the

guidance of the jury or tribunal determining the question, and that measure is stated by the court as a matter of law, applicable to the case. In cases of discrimination or rebating there is no such fixed rule of damage as in the cases where an unreasonable rate has been charged. To say, therefore, that the "*rule of damages*" is precisely the same in both classes of cases—for discrimination and for unreasonable rates—because a party can only recover, in either case, *the amount of his injury*, is confusing the issue. The question really is, Is there a general measure of damages to be applied in either case? To this we answer that there is a general rule to be applied in cases where the action is brought to recover damages on account of an unreasonable charge. If what the learned judge meant to say was that if, in cases of this class, a plaintiff *might not* be entitled to the full measure of damages arising by reason of the unreasonable charge, we admit that that is true. If the shipper paid part and the consignee part of the unreasonable charge, of course the shipper can not recover the whole, but only his proportional part of the total damages. But as stated above this does not change the ordinary rule by which the damages are to be ascertained.

In the case at bar no question was raised about the plaintiff not having paid the full amount of the charges. In fact the report shows that the defendant conceded that the plaintiff had paid the

full rates charged and that, under the ruling of the Commission as to what would have been a reasonable rate, he was entitled *prima facie* to the full amount of the difference as reparation. The general rule of damages, therefore, applies, and no other possible rule is, or can be suggested that would be appropriate to apply in such case.

STATUTE OF LIMITATIONS.

Section 16, after providing a two-year statute of limitations for all complaints for the recovery of damages before the Commission, contains this proviso:

provided that claims accrued prior to the passage of this act may be presented within one year.

There is no provision that this proviso was to apply simply to claims "accrued prior to the passage of" the act that were not more than two years old. It applies in terms clear and explicit to all claims which had accrued at the time the act went into effect. This view was adopted by the Commission and set forth in a conference ruling (Bulletin No. 5, rule 10), as follows:

Claims filed with the Commission since August 28, 1907, must have accrued within two years prior to the date when they are filed; otherwise they are barred by the statute. Claims filed on or before August 28, 1907, are not affected by the two-years' limitation.

This construction has been followed by the Commission in cases coming before it, and has been recognized by the Circuit Court of Appeals for the Sixth Circuit. (*L. & N. R. Co. v. Dickerson*, 191 Fed., 705; *A. J. Phillips Co. v. Grand Trunk Ry. Co.*, 195 Feb. 12.)

The correctness of the Commission's ruling seems to be very well covered by the phrase in the last opinion of the learned judge in the court below. Omitting "legislation regarding the two-years' limitation as to old claims," it would then read:

In order, however, to prevent (shippers having) accrued claims * * * from being taken by surprise and put at a disadvantage, as compared with those * * * whose claims having accrued after the passage of the act had full notice of the time within which they must be prosecuted, Congress gave a year's time within which claims accruing before the passage of the act might be presented to the Commission.

This is not an uncommon provision by the legislative branch of the Government. In providing short terms of limitation, parties whose actions have accrued prior to and without regard to any such limitation are given a short time within which to bring their actions. There is no greater reason why those whose claims had accrued within two years should be protected than there was that all claims which had accrued prior to the passage of the act should be given an equal opportunity to be

presented within the year prescribed. This seems so clearly the intent of Congress and the plain meaning of the words used in the act that further argument is hardly necessary. The mere statement of the proposition seems to carry with it a conviction that the construction adopted by the Commission, and enforced in cases since the passage of the act, is the true construction.

In a recent work on *The Law Relating to the Interstate Commerce Commission*, by John Horatio Nelson, Esq., of the District of Columbia bar, the meaning of the statute as regards limitations is clearly set forth (p. 97) :

If the effect of the above ruling of the Commission is to give all claims at least two years, regardless of when they accrued, then said two-year limitation must be given a retroactive effect and made to apply to claims accrued before the act. All claims for damages arise prior to the passage of the act or subsequent thereto. The first clause requires all complaints to be filed within two years from the time the cause of action accrues, and this provision might have been construed to have a retroactive effect and barred all those existing claims which had not accrued within two years preceding the date of the passage of the act, had it not been for the enactment of the proviso. The proviso has a twofold effect: (a) To save all existing claims for one year; (b) to make it clear that the first clause was not

intended to act retrospectively and apply to existing claims, but was to operate prospectively on claims thereafter accruing. The proviso becomes a substitute for any retroactive effect that might be attributed to the first paragraph. To give the first clause a retroactive effect and allow accrued claims two years would conflict directly and irreconcilably with the proviso. The statute must be interpreted so that all parts of it may take effect and harmonize, if possible. If the subject matter of legislation has been covered by a direct enactment (as has been done by limiting accrued claims to one year), this supersedes any legislation of doubtful interpretation or indirect application to the same subject matter; that is to say, the two years' limitation can never be applied to accrued claims because the law expressly applies the one-year limitation to that class. All provisions of uncertain meaning must be subordinated to direct and specific enactments. Statutes are to be construed to have a prospective operation unless a *contrary* intention in the legislature is manifest and plain. (*Murdock v. Franklin Ins. Co.*, 33 W. Va., 407.)

* * * * *

The limitation provided in the statute is therefore applicable to two classes of claims, viz, (a) accrued claims; (b) those thereafter accruing, leaving the meaning of the statute to be that all claims which had accrued prior to the passage of the act must be pre-

sented to the Commission within one year from the passage of the act, and that all claims accrued subsequent to the passage of the act shall be filed with the Commission within two years from the time the cause of action accrues.

CONCLUSION.

The foregoing discussion covers the issues in which the Commission is particularly interested. The other questions raised are ably discussed by counsel for the plaintiff.

We contend that the Commission is a tribunal created by law and endowed with a jurisdiction to hear and determine claims for damages resulting from the violation by carriers of *any* provision of the act to regulate commerce; that the purpose of the act is to facilitate the adjustment and payment of these damages by allowing the shippers to come before the Commission with their complaints; that where the carrier refuses to comply with the orders of the Commission, and insists upon a trial in court, the proceeding is to be expedited in every way and the burden of the controversy is upon the carrier; that in order to carry out this purpose, the findings of facts made by the Commission, upon which the award of the Commission is made, are to be *prima facie* evidence before the court; that where the findings cover all the ultimate facts essential to the entry of a judgment by the court upon the pleadings, the plaintiff makes out a complete *prima facie*

case by presenting the report and orders of the Commission; that it is the duty of the court in such cases, where no defense is interposed by the carrier, to instruct the jury to find a verdict for the plaintiff; and that upon such verdict a judgment is properly entered; that in this case the findings of facts by the Commission in its report and orders covered every ultimate and material fact necessary to be determined under the issues in these cases. No part of the claims being barred by the statute of limitations, the trial court properly instructed the jury and entered a judgment upon the *prima facie* case made by the plaintiff.

We therefore submit that the judgment of the Circuit Court of Appeals should be reversed, and that the judgment of the lower court should be affirmed.

Respectfully submitted.

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CHAS. W. NEEDHAM,

Counsel for the Interstate

Commerce Commission.



Office Supreme Court U. S.

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Supreme Court of the United States.

OCTOBER TERM, 1914.

Nos. 434 and 435.

HENRY E. MEEKER, surviving partner of the firm of
Meeker & Co.,
Petitioner,
vs.

LEHIGH VALLEY RAILROAD COMPANY,
Respondent.

HENRY E. MEEKER,
Petitioner,
vs.

LEHIGH VALLEY RAILROAD COMPANY,
Respondent.

BRIEF FOR PETITIONER.

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New York,
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SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1914.

HENRY E. MEEKER, surviving partner of the firm of Meeker & Co.,
Petitioner,

vs.

LEHIGH VALLEY RAILROAD COMPANY,
Respondent.
(No. 434).

Brief for Petitioner.

HENRY E. MEEKER,
Petitioner,

vs.

LEHIGH VALLEY RAILROAD COMPANY.
Respondent.
(No. 435.)

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Statement.

Certiorari to review judgments of reversal directed by the Circuit Court of Appeals for the Third Circuit, reversing two judgments in favor of the petitioner for \$109,280.17

NOTE: The Record in No. 435 is in most respects identical with that in No. 434, and the references in this brief will be to the latter Record and to the top or print paging, unless otherwise indicated. For greater precision and convenience, the references are occasionally made to the marginal or original paging, which is indicated by prefixing a star to the number of the page.

and \$13,161.78, respectively, entered upon verdicts rendered in actions brought under Section 16 of the Act to Regulate Commerce, to recover damages upon orders of reparation made by the Interstate Commerce Commission.

The petitioner is the surviving member of the firm of Meeker & Co., dealers in anthracite coal in the City of New York, who obtained their coal in the anthracite region of Pennsylvania and shipped it to tidewater at Perth Amboy, New Jersey, over the Lehigh Valley Railroad.

On July 17, 1907, Meeker & Co. instituted a proceeding before the Interstate Commerce Commission (No. 1180), in which they complained that the Railroad Company had unlawfully discriminated against them in the rates charged between November 1, 1900, and August 1, 1901, and had thereafter, down to the commencement of the proceeding, charged them unreasonable and excessive rates for the transportation of coal; and they asked for an order to cease and desist and for reparation.

Issue was joined; and the matter proceeded to a hearing. A large amount of evidence was taken, the hearings having extended over a period of about four years (*138).

In 1911, the Commission filed its report in favor of the complainants (16-48), in which it found that the rates charged complainants from November 1, 1900, to August 1, 1901, had been unjustly discriminatory, in an amount specified (*36), and that the subsequent rates had been unreasonable, to the extent stated (*72), and that reparation should be made in each case, and that further proceedings should be taken to determine the amount (*73).

An order was entered, requiring the Company to cease and desist from charging the rates then in effect, which were held to be unreasonable (48).

After taking further evidence on the question of damages, the Commission filed a supplemental report, in May, 1912 (10-12), upon which an order was entered (13), finding that complainants were damaged and the amount of reparation to which they were entitled, both for the unjust discrimination between November 1, 1900, and August 1, 1901 (\$11,009.33 and interest), and for the unreasonable rates subsequently charged (\$58,236.45 and interest).

On April 13, 1910, while the first proceeding was still

undisposed of, Mr. Meeker instituted another proceeding (No. 3235 before the Commission), to recover the damages for alleged unreasonable rates charged subsequent to July 17, 1907 (*37). The evidence taken in the first proceeding, which covered the period included in the second proceeding, was treated by both parties as applicable to the second proceeding; and a similar decision was rendered in the second proceeding. The Commission awarded the sum of \$10,813.60 for the damages sustained as the result of the unreasonable rates charged subsequent to April 13, 1908, (*19), having declined to allow any damages for the period prior to two years before the commencement of the proceeding (April 13, 1908), on the ground (*18) that the claim for such damages was barred by the two year statute of limitations passed in 1906, amending Section 16 of the Act (34 Stat. L. 590). An order of reparation was entered, accordingly (*21).

The Railroad Company refused to pay the amounts awarded; and, in September, 1912, two actions were commenced against the Company, in the United States District Court for the Eastern District of Pennsylvania (the road of the Company running through that District), to enforce the orders of reparation and recover the damages sustained by reason of the wrongful acts of the Company.

In the petitions or complaints in these actions, all the facts entitling the plaintiff to recover damages were fully pleaded; and the reports and order of the Commission were annexed as exhibits (No. 434, 3-48; No. 435, 3-45).

Issue was joined by a plea containing a general denial, the defense of the statute of limitations, that the Commission had no jurisdiction to make the findings and orders of reparation sought to be enforced, and that there was no substantial evidence to sustain the findings and orders (No. 434 *75; No. 435 *70).

The actions came on for trial before Judge HOLLAND and a jury, in November, 1912. In each case, the plaintiff offered in evidence the original and supplemental reports of the Commission and order of reparation (No. 434, *92, *106-7; No. 435, *75, 83); proof of the due service of the order having been conceded by the defendant (*116-117). The plaintiff gave some formal testimony as to the shipments of the coal upon which the claims for damages were based and as to the fact

that the Railroad Company had not paid the amounts awarded by the Commission (No. 434, 50-80 ; No. 435, 46-57), and then rested.

No evidence on the main issues was offered by the defendant. The defendant merely submitted and explained certain itemized statements, which had formed part of the evidence before the Commission, showing the dates of the shipments, so as to enable the Court to apply the statute of limitations upon the different contentions urged by the defendant (80-86).

The Court requested that the reports and orders be read to the jury (* 138) ; and, thereupon, counsel for the plaintiff read such portions thereof to the jury as he deemed material, without objection on the part of the defendant's counsel (* 138).

The Court then charged the jury (No. 434, 89 ; No. 435, 59) ; and a verdict was rendered in favor of the plaintiff in each case ; in the first case, for \$109,280.17 (* 210) and in the second case, for \$13,161.78 (No. 435 * 118) ; and judgments were entered accordingly.

A motion for a new trial was denied in each case ; and, upon the plaintiff's application and upon submission of the record of the proceedings before the Commission and upon the oral statements of plaintiff's counsel in open court, without objection, the Court fixed and taxed as part of the costs the attorneys' fees for services performed in the proceedings before the Commission and in the actions ; the amounts being, respectively, in the first case, \$10,000 for services before the Commission and \$10,000 for services in the action, and, in the second case, \$2500 for services before the Commission and \$2500 for services in the action (No. 434 * 212 ; No. 435 * 120). Judgments were thereupon entered in favor of the plaintiff, which were reviewed, upon writ of error, by the Circuit Court of Appeals for the Third Circuit. The cases were argued in that Court in April, 1913 ; and, in the following August, a decision was rendered, reversing the judgment in each case and directing a new trial (No. 434, *321 ; No. 435, *223).

The main ground upon which the decision was originally based was that the findings of the Commission were not in the form required by the Act to justify their use as evidence upon the trial of an action under Section 16, and that the trial court

had not properly instructed the jury as to what particular findings the jury could consider. The Court below was also of the opinion that the findings and order of the Commission, even though in proper form and not controverted, did not make out a *prima facie* case upon which the plaintiff was entitled to judgment (133 ; 211 Fed. 785).

On the question of the statute of limitations, the Court held that, under the amendatory Act of 1906 (34 Stat. L., 590), permitting complaints to be made on *existing* claims within one year and barring all other claims at the end of two years, Meeker & Co. could not recover upon any existing claims arising prior to July 17, 1905 (two years before the complaint was made to the Commission). Upon this construction of the statute, which was contrary to the construction which had always been placed upon it by the Commission, about 75% of the total claims of Meeker & Co. were barred.

In October, 1913, upon the application of the defendant in error, the Circuit Court of Appeals granted a rehearing (132). The reargument took place in December, 1913. By a supplemental opinion handed down in February, 1914, the Court adhered to its previous decision ; but it did so on the ground that the findings and order of reparation could, under no circumstances, make out a *prima facie* case of liability for the amount specified in the order of reparation (151 ; 211 Fed., 802).

Thereafter, in April, 1914, this Court, upon the petition of the defendant in error in the Court below, granted an application, under Section 262 of the Judicial Code, for a writ of *certiorari* to review the judgments of the Circuit Court of Appeals (No. 434, 162 ; No. 435, 122).

The practice of the Commission in the present case, in making its reports and in awarding damages, has been that which has been uniformly observed by the Commission since its establishment, as the official Reports of its proceedings show. The effect of the decision of the Circuit Court of Appeals in the cases at bar is to reverse the settled practice of the Commission, to disregard the construction which has for many years been placed by the Commission upon the Act, and to throw a burden upon the shipper, in attempting to obtain redress for his grievances, greater than that which existed at common law.

Specification of Errors.

The Court below erred in reversing the judgments and directing a new trial in each case, and it should have affirmed the judgments in all respects. The Court also erred in holding that the findings and orders of reparation in these cases were not in the form required by the Act to Regulate Commerce, that they were not properly received in evidence or presented to the jury by the trial court, and that they did not, under Section 16 of the Act to Regulate Commerce, make out a *prima facie* case upon which the plaintiff was entitled to judgment. The Court also erred in holding that any part of the claim of Meeker & Co. was barred by the statute of limitations and in the construction placed by it on the amendatory Act of 1906 (34 Stat. L., 590).

P O I N T S .

FIRST.

Procedure under the Act.

The main purpose of the Act to Regulate Commerce was to ensure the reasonable and equal treatment of shippers by the common carriers and to provide for a simple, effective and inexpensive method of obtaining redress for violations of the law.

Tex. & Pac. R. Co. v. Abilene Cotton Oil Co., 204 U. S., 426, 439 ;
New Haven R. R. v. Int. Com. Com., 200 U. S., 361, 391 ;
Robinson v. B. & O. R. R. Co., 222 U. S., 506, 509.

The resort to the courts was expensive and tedious, as they were not adapted to giving prompt and efficient relief and could not determine the facts in a uniform manner, under the varied conditions prevailing in different parts of the country. A body which would acquire intimate knowledge of the transportation conditions throughout the entire country and which would become familiar with all the problems growing out of the varying conditions, would evidently be the only tribunal in which practical relief could be obtained speedily and with the least possible expense and trouble, provided the procedure was simple and free from the technicalities which necessarily find their way into any regular system of legal procedure.

In the Report of the Committee on Interstate Commerce, made on January, 18, 1886, it was stated (p. 214) to be one of the purposes of the Act to "provide additional means of obtaining redress with much less difficulty and expense," and to make the report of the Commission "substantially establish the case of the complainant."

That it was the intention of Congress not to prescribe any rigid form of procedure is apparent throughout the Act.

I. Not one of the Commissioners is required to be a lawyer (Sec. 11). It was, therefore, evidently not intended to have

the strict rules of evidence applied in hearings before the Commission.

Int. Com. Com. v. Baird, 194 U. S., 25;
Int. Com. Com. v. L. & N. R.R. Co., 227 U. S. 88,
93.

II. All that a person aggrieved is required to do under the Act is to apply to the Commission by petition, "which shall briefly state the facts" (Sec. 13). It was not contemplated that a shipper would be obliged to employ counsel to draft the petition. Indeed, Section 17 expressly provides that any party may appear in person; and it has been held that the complaint may be made in a letter to the Commission.

Dickerson v. L. & N. R. R. Co., 15 I. C. C. Rep.,
170, 172;
L. & N. R. R. Co. v. Dickerson, 191 Fed., 705, 711
(C. C. A., 6th Circ.).

Upon filing a petition, the carrier must then either satisfy the complaint or file an answer. In case an answer is filed, the Commission does not proceed to a formal trial of the issues. It is merely required "to *investigate* the matters complained of in such manner and by such means as it shall deem proper" (Sec. 13). Thus, the matter becomes one of inquiry by the Commission and not of the technical trial of the issues raised by the petition and answer, in the strict manner required by the rules of evidence in courts of law. This is made still more apparent by the further provisions of Section 13, requiring the Commission to investigate any complaints made by the Railroad Commission of any State; and such investigation is required to be made "in like manner and with the same authority and powers" as in the case of a complaint by a person directly aggrieved; and, under Section 13, the Commission may also institute an inquiry on its own motion and dispose of it in like manner as if it had been instituted by the filing of a petition by a shipper.

III. Having completed its investigation or inquiry, all that the Commission is required to do is to make a written report, stating its conclusions and decision; and if damages are awarded, the report must also "include" the findings of

fact. The language of the statute upon this point is as follows:

"SECTION 14. That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order or requirement in the premises; *and in case damages are awarded, such report shall include the findings of fact on which the award is made.*"

No particular form of report is prescribed; and where damages are awarded, no *separate* findings of fact are required to be made. It is sufficient if the findings are included in the report, that is, if they can be found in the report.

IV. Findings of fact made by the Commission, where there is evidence to support them, will not be disturbed by the Courts; and findings as to the reasonableness of rates, or as to any administrative act, are conclusive.

Tex. and Pac. Ry. v. Abilene Cotton Oil Co., 204 U. S., 426;

B. & O. R. R. Co. v. Pitcairn, 215 U. S., 481; Int. Com. Com. v. D. L. & W. Ry. Co., 220 U. S., 235, 251;

Int. Com. Com. v. Un. Pac. R. R. Co., 222 U. S., 541, 547;

Int. Com. Com. v. L. & N. R. R. Co., 227 U. S., 88, 92, 100;

Intermountain Rate Cases, 234 U. S., 476, 490-1.

V. Where damages are awarded, the first sentence of Section 16 provides that "the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named."

VI. Having obtained a report of the Commission in his favor and an order awarding him reparation, the shipper would be entitled to proceed forthwith to enforce payment of the amount awarded, were it not for the constitutional provision entitling the carrier to a trial by jury, where a claim for damages is sought to be enforced. That provision, however,

does not prevent the legislature from prescribing rules of evidence.

2 Wigmore on Evidence, Sec. 1354, sub. 3; C. B. & Q. R. R. Co. v. Jones, 149 Ill., 361; Bur. Ced. Rap. & R. R. Co. v. Dey, 82 Ia., 312; Holmes v. Hunt, 122 Mass., 505, 516; Kentucky & C. Bridge Co. v. L. & N. R. R. Co., 37 Fed. 567, 614; Western N. Y., etc., R. R. Co., v. Penn Refining Co., 137 Fed. 343 (C. C. A., 3rd Circ.); Int. Com. Com. v. Ala. Midland Ry., 168 U. S., 144, 175; Int. Com. Com. v. Un. Pac. Ry., 222 U. S. 538, 546;

and this was recognized by the Court below in the present cases (*245); and it was competent for Congress to provide that the findings of the Commission and the order directing the payment of damages should be *prima facie* evidence of the facts therein stated. The provisions of Section 16 on this point, are as follows:

"If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the circuit court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any state court of general jurisdiction having jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit in the Circuit Court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated."

It is noticeable, that, in the case of an action under this Section, no greater formality in the pleading is required than in the case of an ordinary complaint by the shipper to the Commission, under Section 13.

SECOND.**The procedure in the cases at bar.**

The procedure in the present cases was strictly in accordance with the provisions of the statute. Upon complaints duly made, to which answers were filed, the Commission made its investigation and filed written reports, which stated its conclusions and decisions and included the findings of fact on which it awarded damages; and it subsequently made orders directing the payment of the damages awarded on or before a day named. In actions duly brought to recover the damages thus awarded, the reports and orders were read in evidence; and no evidence was offered in rebuttal.

Obviously, unless some defect can be pointed out in this procedure, the petitioner was not only entitled to a verdict, but the Court should have given binding instructions in his favor. A verdict in favor of the defendant would have been set aside as contrary to the evidence.

THIRD.**Findings of fact included in the Reports.**

I. Counsel for the Railroad Company successfully contended in the Court below that no proper findings of fact were made by the Commission, on which damages could be awarded.

The findings are required to be "included" in the report. The report must be in writing; and provision is made for the publication of the reports of the Commission for the information and use of the public (Sec. 14).

No different form of report is prescribed where the inquiry is made by the Commission, on its own motion, from that which is required where the investigation is made upon a complaint after an extended hearing. It is, therefore, entirely

clear that there was no intention to require any specific findings of fact or any findings in any particular form. The intention obviously was merely to require findings to be made, showing a violation of the Act from which a liability would arise under Section 8. If the findings do not show that the statute has been violated, there is, of course, no basis for an award of damages. Whether a liability results from the findings is a question of law for the court. If the facts appear anywhere in the report, showing a violation of the statute, that is sufficient. To require more than this would be to place form above substance and to make it possible to set aside a report and order of the Commission on purely technical grounds and thus render futile a prolonged and expensive hearing. This possibility was pointed out by Judge HOLLAND, with common-sense directness, in his refusal on the trial to exclude the report upon the technical grounds urged, when he said (No. 435, *77) :

"The reports, the conclusions and the findings of fact in the report are not what probably they might be for clearness ; but it is not a proper thing that litigants should suffer by reason of any neglect of government officers in inartistically or negligently drawing reports ; and if the Interstate Commerce Commission draws a report which substantially complies with the Act, it ought to be sustained, notwithstanding the fact that it shows a very negligent manner of treating the subject."

II. The reports in the present case are not inartistically or negligently drawn. They contain a concise statement of the facts and a clear and comprehensive discussion of the evidence, followed by the conclusions and recommendations of the Commission ; and they also contain a direct and positive finding of the facts upon which the Commission based its award ; and these findings are exactly where one would expect to find them, in an orderly discussion of the subject, namely, at the conclusion of the statement of facts and the discussion of the evidence.

In the first proceeding (No. 1180), the Commission found that the Railroad Company had carried coal to tidewater during the period from November 1, 1900, to August 1, 1901,

for shippers other than Meeker & Co., at a rate which was 35% of the tidewater price of coal, while Meeker & Co. were charged 40%. The Commission, after setting forth the facts, said (*36) :

" We are of the opinion, and so hold, that complainants have sustained the allegation of unjust discrimination under the second section of the Act. Reparation, with interest from August 1, 1901, will be awarded on this account."

As to the claim based upon the alleged unreasonable rates subsequent to August 1, 1901, the Commission, after a comprehensive review of the evidence, found that the rates charged Meeker & Co. were unreasonable ; and it also found what the reasonable rates should have been. Its conclusion in this respect was as follows (*72-3) :

" After a careful study of defendant's exhibits relating to tonnage and cost of moving, as well as a pains-taking analysis of its voluminous exhibits respecting its past and present financial condition, we are of opinion, *and so find*, that defendant's rates for the transportation of coal from the Wyoming region to Perth Amboy, of \$1.55 per gross ton on prepared sizes, \$1.40 on pea coal and \$1.20 on buckwheat coal, are unreasonable in so far as they exceed \$1.40 on prepared sizes, \$1.30 on pea coal and \$1.15 on buckwheat * * *

We are further of opinion, that reparation should be awarded upon the basis of the rates herein found to be reasonable, upon the shipments of coal by complainants from the Wyoming region to Perth Amboy since August 1, 1901. The amount of reparation which should be awarded under our finding in this case cannot be ascertained from the exhibits now on file ; and such further proceedings will be had as may be necessary to determine the amount of money due to complainants."

An order was accordingly made, requiring the Railroad Company to cease and desist from enforcing the rates held to be unreasonable and to establish and maintain for a period of two years the rates found to be reasonable (*74).

III. In accordance with the decision of the Commission, further proceedings were then taken to ascertain the facts

upon which the amount of reparation should be determined. In May, 1912, a supplemental report was filed, in which the facts were clearly and distinctly found upon which the reparation was awarded. In this supplemental report, the Commission made the following finding (*16-17) :

"On the basis of our conclusions in the former report, and upon consideration of the evidence adduced at the hearing upon the question of reparation, we now find, that during the period from November 1, 1900, to August 1, 1901, complainant shipped from the Wyoming coal region of Pennsylvania to Perth Amboy, N. J., 55,257.75 tons of coal of prepared sizes, 16,689.76 tons of pea coal, 11,448.93 tons of buckwheat coal, and 4,926.77 tons of rice coal, and paid charges thereon, amounting to \$129,989.18, at the rates found to have been unjustly discriminatory; that complainant *has been damaged* to the extent of the difference between the amount which he did pay and \$118,979.85, the amount which he would have paid had he been given the benefit of the rates applied by defendant to similar shipments of the Lehigh Valley Coal Company; and that he is, therefore, entitled to an award of reparation in the sum of \$11,009.33, with interest thereon from August 1, 1901. We find further, that from August 1, 1901, to July 17, 1907, complainant shipped from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., 246,870.15 tons of coal of prepared sizes, 106,051.09 tons of pea coal and 87,250 tons of buckwheat coal, and paid charges thereon amounting to \$685,375.27, at the rates found to have been unreasonable; that complainant *has been damaged* to the extent of the difference between the amount which he did pay and \$626,945.62, the amount which he would have paid at the rates found reasonable, less \$193.20, deducted by stipulation of all parties on account of certain claims already paid; and that he is, therefore, entitled to an additional award of reparation in the sum of \$58,236.45, with interest, amounting to \$27,750.65, on the individual charges comprising said sum, from the dates of payment thereof to September 1, 1911, together with interest on said sum of 58,236.45 from September 1, 1911."

IV. With reference to the claim made in the second proceeding (No. 3235), for reparation for unreasonable rates

charged subsequent to the filing of the petition in the first proceeding (No. 1180), the Commission said (*17-19) :

" With the exception of the reparation features, the issues involved in No. 3235 have been passed upon by the Commission in No. 1180. The latter case covered the period from November 1, 1900, to July 17, 1907, while the instant case is designed to secure reparation upon shipments which moved between July 17, 1907, and April 13, 1910. The petition in the present case, therefore, resolves itself into a prayer for reparation on shipments moving subsequent to the period covered by the original report, on basis of the conclusions announced in that report.

In No. 1180, the complainant attacked the reasonableness of rates charged by defendant for the transportation of various sizes of anthracite coal from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., and asked reparation. On June 8, 1911, the Commission rendered its decision in that case. The petition in the present case was filed on April 13, 1910, or about a year prior to our decision in No. 1180. As before stated, it attacks the same rates that were found unreasonable in No. 1180, and asks reparation on shipments moving from July 17, 1907 to April 13, 1910.

* * *

On basis of our decision in No. 1180, and upon consideration of the evidence submitted at the hearing of the present case regarding the amount of reparation due complainant, we now find that the rates exacted by defendant for the transportation of anthracite coal from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., during the period from April 13, 1908, to April 13, 1910, were unreasonable to the extent that they exceeded rates of \$1.40 per gross ton on prepared sizes, \$1.30 on pea and \$1.15 on buckwheat; that complainant shipped from said point of origin to said destination during the period above set forth, 46,772.02 tons of coal of prepared sizes, 26,972.06 tons of pea coal and 22,004.09 tons of buckwheat coal; that complainant paid charges thereon, amounting to \$136,663.41, at the rates herein found to have been unreasonable, and was damaged to the extent of the difference between the amount which he did pay and \$125,849.81, the amount which he would have paid at the rates above found reasonable; and that he is, therefore, entitled to an award of reparation in the sum of \$10,813.60, with interest amounting to \$1,526.53 upon the individual

charges comprising said sum, from the dates of payment thereof to September 1, 1911, together with interest on said sum of \$10,813.60 from the 1st day of September, 1911."

V. Orders of reparation in each case were thereupon entered (No. 434, p. 14; No. 435, pp. 11-12), directing the amount to be paid by the Railroad Company.

In the supplemental report upon which these orders were based, the correctness of the amounts found to be due by the orders of reparation is stated by the Commission to have been "conceded of record by defendant" (*19).

VI. In view of the explicit finding of the facts upon which the awards were based, how can it possibly be contended that the reports did not "include" the necessary findings? It might just as well be asserted that the reports did not state the conclusions reached by the Commission, or that they did not contain a discussion of the facts. The view taken by the Court below, that the reports in the present case did not include the findings of fact upon which the awards were made, is one that is flatly and unmistakably contradicted by the record; and, indeed, it is contradicted by the Court itself which recognized, in its original opinion, that there had been findings of fact by the Commission to the effect that the rates charged between November 1, 1900, and August 1, 1901, had been unjustly discriminatory and that the subsequent rates had been unreasonable. On these points, the Court there said (*276):

"By this report, the Interstate Commerce Commission held that the charges by the defendant to the plaintiff between November 1, 1900, and August 1, 1901, were discriminatory and, therefore, unlawful; and also that the charges of the defendant Company between August 1, 1901, and July 1, 1907, were unreasonable;"

and the Court then states what charges the Commission had found to be reasonable.

FOURTH.

Practice established by Commission controlling.

I. The Commission is expressly required, by Section 12, to enforce the provisions of the Act. By Section 17, the procedure for this purpose is left entirely to the discretion of the Commission ; the language of so much of the Section as is pertinent being as follows :

“ That the Commission may conduct its proceedings in such manner as will best conduce to the proper despatch of business and to the ends of justice. * * * Said Commission may, from time to time, make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it.”

II. Even if absolute discretion as to the procedure had not been expressly conferred upon the Commission, its construction of the Act would be entitled to the greatest consideration.

Cohens v. Virginia, 6 Wheat., 264 ; and when it has long been continued, the courts will recognize it as conclusive.

United States v. Hill, 120 U. S., 169, 180 ;
 Robertson v. Downing, 127 U. S. 607, 613 ;
 United States v. Alabama, etc. R. Co. 142 U. S.
 615, 621 ;
 New Haven Railroad v. Int. Com. Com., 200 U. S.
 361, 401-2 ;
 Logan v. Davis, 233 U. S., 613, 627.

The published Reports of the Commission show that the practice pursued by the Commission in the present case, in making findings, is the same as that which has always been pursued since the Act took effect.

III. If the Courts were to interfere with the findings and order of the Commission on the ground of informality, the

main object of the Act, which was to ensure the fair and uniform treatment of all shippers, might be defeated and the conclusions and recommendations of the Commission be disregarded or modified.

FIFTH.

Orders of reparation, supported by findings, establish the damages sustained in an action under Section 16, if not controverted.

I. The orders directing the reparation to be made by the Railroad Company made out a *prima facie* case of the damages sustained by the plaintiff, upon the trial of the actions under Section 16. The Company was at liberty to show that there was no evidence before the Commission of any damage sustained by Meeker & Co.; or it might have produced affirmative evidence tending to show that Meeker & Co. sustained no damages or that the amount of the damages awarded by the Commission was excessive. But it did none of these things; and it cannot now be heard to question the correctness of the awards made. In the absence of rebutting evidence, the order making an award has precisely the same force and effect as the findings on the question of reasonableness and discrimination.

Mitchell Coal Co. v. Pennsylvania RR. Co. 230 U. S. 247, 258.

II. Not only did the Railroad Company not introduce any affirmative evidence in the present cases to controvert the findings of the Commission, but it did not even put in evidence the record of the proceedings before the Commission. It was, therefore, impossible for the Court below to say that the findings were not supported by the evidence.

III. Section 12 of the Act requires the Commission to "keep itself informed as to the manner and method" in which

the business of the common carriers is conducted; and it is empowered by that Section and by Section 20, "to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created."

The Commission is, therefore, in a better position to give proper weight and effect to the evidence presented on the question of damages than any other tribunal; and every presumption should be indulged in to support its award, which should be sustained, unless it is shown that some principle of law has been violated in making the award.

IV. That no principle of law was violated in assessing the damages is apparent from the statement contained in the supplemental report of the Commission, made after further evidence on the question of damages had been given, that "the accuracy of the figures in said exhibits respecting the shipments made, freight charges paid *and reparation due, is conceded of record by defendant*" (* 19). In view of this concession, the Railroad Company is in no position to question the amount of damages, if the Commission had the power to award any damages whatever.

SIXTH.

No error in the award of reparation based upon the unreasonable rates.

The total damages awarded in the two proceedings, exclusive of interest, was \$80,059.38 (14-15). Of this total, only \$11,009.33 was awarded on the ground of unlawful discrimination (15), thus leaving \$69,050.05, or about 87% of the total amount, representing the damages based upon the excessive or unreasonable charges.

The Commission expressly found what rates should have been charged for the different sizes of coal and what rates were actually charged (*72). It also found the number of

tons of coal of the different sizes that had been shipped and that the damages sustained represented the difference between the rates actually charged and the rates that should have been charged (*17). These findings were amply sufficient to justify the awards made on this ground.

I. In the absence of any other evidence, it was entirely proper for the Commission to base its award upon the difference between the excessive charges and the charge which it found to be reasonable. That principle has been uniformly followed by the Commission from its earliest days, in making its awards in such cases.

Perry v. Florida, etc. Ry. Co., 3 I. C. C. Rep., 740 ;
 Burges v. Transcontinental Tr. Bur., 13 I. C. C. Rep.,
 668 ;
 Memphis Freight Bureau v. Kansas City So. Ry.
 Co., 17 I. C. C. Rep., 90 ;
 Arkansas Fuel Co. v. C. M. & St. P. Ry. Co., 16
 I. C. C., 95, 98 ;
 Allen v. C. M. & St. P. Ry. Co., 16 I. C. C. Rep.,
 293 ;
 Cohen v. Southern Ry. Co., 16 I. C. C. Rep., 177 ;
 American Crestos Works, Ltd., v. Ill. Cent. R. Co.,
 18 I. C. C. Rep., 212 ;
 Sondheimer v. Ill. Cent. R. Co., 20 I. C. C. Rep.,
 606, 611 ;
 Humboldt Refining Co. v. M. K. & T. Ry. Co., 22
 I. C. C. Rep., 363, 365 ;
 Riverside Mills v. St. L. & S. F. R. Co., 24 I. C. C.
 Rep., 264, 267, 271 ;
 Betcher Lumber Co. v. C. M. & St. P. Ry. Co., 26
 I. C. C. Rep., 335, 340 ;
 J. E. Bryant Co. v. F. W. & D. C. Ry. Co., 28
 I. C. C. Rep., 594, 598.

In *Allen v. C. M. & St. P. Ry. Co. (supra)*, the Commission said (p. 295) :

"The Commission has repeatedly held, that where it finds the rate exacted to have been unreasonable, it may award reparation by the difference between that rate and that which is reasonable, notwithstanding the former was the rate duly established by the carrier for the time being. We find that the rates charged were unreasonable and should not have exceeded the through rate established by the defendant and still in effect.

Reparation will, therefore, be ordered in the sum of \$190.74, which is the difference between the charges assessed and paid and those subsequently established."

The reparation awarded in the Allen and Arkansas Fuel cases was referred to with approval by this Court, in the Mitchell Coal Case, where the Court, after citing those cases, said (230 U. S., 247, 260) :

"The Commission, after the abandonment of a rate, has repeatedly received and heard complaints, and upon finding that it had been unreasonable, has granted reparation *accordingly*."

What the Court meant by the word "accordingly" was the overcharge, as appears from what it said on the previous page (p. 259) :

"Under the statute, the carrier has the primary right to fix rates, and so long as they are acquiesced in by the Commission, the carrier and shippers are alike bound to treat them as lawful. After the rate has been abandoned, the carrier is still obliged to treat it as having been lawful and cannot *refund* what had been collected under it *until* the Commission determines that what was apparently reasonable had in fact been unreasonable."

The Court here clearly had in mind the refunding or restitution of the overcharge; and it employs the word "reparation," in this and other instances (204 U. S., 438, 441, 443), as the Commission has always done, in the sense of the restitution or refund of the amount unlawfully exacted.

After making the statement contained in the language just quoted, the Court goes on to show that there is the same reason for having the Commission determine the reasonableness of rates for the past as there is for the present or the future, namely, to ensure uniformity in awarding reparation; and, after further discussion of the necessity of having the Commission determine the question of reasonableness in all its phases, the Court said (p. 264) :

"What is or was a proper allowance is not a matter of law until after it has been fixed by the rate-regu-

lating body. The Courts can then apply that law, and, measuring what has been charged by what the Commission declares should have been charged, can award damages to the extent of the injuries occasioned by the payment of the allowance found to have been unreasonable and unlawful."

The same principle was distinctly recognized by this Court in the Abilene Cotton Oil case (204 U. S., 426), where the Court said (p. 436) :

"It is also beyond controversy, that where a carrier accepted goods without payment of the cost of carriage or an agreement as to the price to be paid, and made an unreasonable exaction as a condition of the delivery of the goods, an action could be maintained to recover the *excess over a reasonable charge*. And it may further be conceded that it is now settled, that even where, on the receipt of goods by a carrier, an exorbitant charge is stated and the same is coercively exacted, either in advance or at the completion of the service, *an action may be maintained to recover the overcharge*."

The same principle was also recognized in a later decision of this Court.

Southern Ry. Co. v. Tift, 206 U. S., 428, 440.

In that case, the Railway Company filed advance rates on lumber, and a suit was brought to enjoin it from putting the rates into effect. The Court declined to grant the injunction ; and the advanced rates became effective and were paid by complainant. The Court held the bill so as to enable the plaintiffs to apply to the Interstate Commerce Commission to have the advanced rates declared unreasonable. An order was made by the Commission, declaring the old rates reasonable and the advanced rates unreasonable ; and the Circuit Court then referred the case to a Master, to ascertain "the sum total of the increase in rates paid by each of the complainants and other members of the Georgia Sawmill Association to either or all of the defendant companies since the rate went into effect, to the end of the litigation." Commenting upon the practice, this Court, at the close of its opinion, said (p. 440) :

"The objection that the reference is too broad is not of substance. What the court may award upon the

coming in of the report of the Master, we can not know. *Presumably, it will make the reparation adequate for the injury, and award only the difference on the old rate and to those who are parties to the cause."*

II. This method of fixing the liability, by requiring the return of the overcharge, is based upon natural justice. By an unlawful act, the carrier has taken advantage of its position and compelled the shipper to pay a sum in excess of what it had any right to exact. This sum the carrier is, therefore, under a moral and legal obligation to return; and the return of the overcharge will presumably repair the wrong so far as the shipper is concerned. On the other hand, it would be most unjust to permit the carrier to retain what it had wrongfully extorted and compel the shipper to show precisely how and in what respect and to what extent he had been injured by the carrier's misappropriation of the shipper's property.

III. Even if there had been a different rule at common law, the only principle that can properly be applied under the Act to Regulate Commerce is that the liability should be represented by the amount of the overcharge. Any other rule would bring about diversity instead of uniformity of treatment of shippers by the carriers. If the Commission was not permitted to assess the damages in the first instance, for the protection of the carriers and for the guidance of the courts and juries, the amounts awarded would vary in every jurisdiction and in every action. This was expressly commented on by this Court, in the Abilene Cotton Oil case, where it was said, after referring to the power of the Commission to prescribe rates for the future (204 U. S., 426, 446) :

" And like reasoning would be applicable to the granting of reparation to an individual after the establishment of a new schedule, because of a wrong endured during the period when the unreasonable schedule was enforced by the carrier and before its change and the establishment of a new one. In other words, the difference between the two is that which, on the one hand, would arise from destroying the uniformity of

rates which it was the object of the statute to secure, and, on the other, from enforcing that equality which the statute commands."

The same conclusion was pointed out in the Mitchell Coal case (230 U. S., 247, 254).

SEVENTH.

No error in the award of reparation based upon the discrimination.

I. In the Court below, counsel for the Railroad Company contended that, in the case of discrimination, the damages can never be the difference between the rate paid and the rate given to the favored shipper, that is, the amount of the rebate; and the decision of this Court in the International Coal Company case (Pennsylvania R. R. Co. v. International Coal Company, 230 U. S., 184) was relied upon as an authority for the proposition.

That case held nothing of the kind. An action based on unlawful discrimination had been commenced in the United States Circuit Court, *without previous application to the Commission*. The plaintiff assumed that by merely alleging and proving the fact of discrimination, he would be entitled, as a matter of law, to damages in the amount of the rebate. The complaint, as this Court observed (p. 198), contained "neither allegation nor proof" of any actual damages, although, as the Court also said (p. 204): "It is elementary that, in a suit at law, both the fact and the amount of the damages must be proved."

The Court did not hold that the damages might not have been the same as the rebate. On the contrary, it expressly said (p. 203), that "Those damages might be the same as the rebate;" and it quoted (p. 207) with approval from a decision of the Supreme Court of Pennsylvania (Hoover v. Pennsylvania R. R. Co., 156 Pa. St. 220, 244) to the same effect.

II. Inasmuch as it was permissible for the Commission to find as damages the amount of the rebate, its finding was certainly *prima facie* evidence of the fact under Section 16; and this finding was not challenged by the Railroad Company, either by showing what the evidence before the Commission was or by proving affirmatively that the plaintiff had not sustained any damages.

III. The finding of the Commission, that the damages were equal to the rebate allowed to the Lehigh Valley Coal Company, cannot be questioned by counsel for the Railroad Company, because they did not produce the evidence upon which the Commission relied. But the evidence referred to by the Commission in its original report fully sustains the finding of the damages.

The entire capital stock of the Lehigh Valley Coal Company was owned by the Railroad Company (*28, 36); and the Commission said (*62), that "the record shows that the only line of demarcation between the Lehigh Valley Railroad Company and the Lehigh Valley Coal Company is one of bookkeeping."

The Commission found that the Coal Company monopolized the market reached by it; the amount shipped by it gradually increasing until 1908, when the Coal Company controlled 95% of the anthracite tonnage over the lines of the Railroad Company to Perth Amboy (*62); and, necessarily, the price that the Lehigh Valley Coal Company received for this coal, at tidewater, fixed the market price of coal there to all other shippers, including Meeker & Co.

From November 1, 1900, to August 1, 1901, the price paid at the mines for coal was 60% of the tidewater price, thus making the rates charged to shippers to Perth Amboy 40% of the tidewater price, as the tariff rate then in force was purely nominal; but, during that period, a change in the purchase price, or, so far as the shippers were concerned, in the rate that would be more favorable to shippers, was in contemplation, and it was understood that when the change was made, it would take effect retroactively as of November 1, 1900, and that the excess paid by the shippers would be returned to them. On August 1, 1901 (*31), the arrangement was carried into effect, accordingly, and the rate fixed at 35% of the tide-

water price from November 1, 1900, to August 1, 1901; and the Railroad Company returned to all shippers, except Meeker & Co., the 5% difference (21); thus clearly recognizing that the amount of the rebate correctly represented the damages. This conclusion inevitably followed from the facts; because, the coal of the Lehigh Valley Coal Company and that of Meeker & Co. had been sold at the same price. When, therefore, the Coal Company received the rebate, the Railroad Company, which owned it, was the actual beneficiary and was wrongfully enriching itself at the expense of all other shippers not similarly treated. The result was that the Railroad Company prevented Meeker & Co. from receiving the same price for their coal that its own Coal Company received; and Meeker & Co. were damaged to that extent.

IV. While the Commission made its award for the period from November 1, 1900, to August 1, 1901, on the theory of discrimination, the facts found show that the award would have been completely justified on the basis of an unreasonable charge. The rates were charged, with the understanding that they were to be adjusted, that is, placed upon a more reasonable basis and that the shippers were to have the benefit of such adjustment (*31). Therefore, when the Railroad Company subsequently reduced the rate to every one except Meeker & Co., it made the reduced rate the lawful and reasonable rate; and it, consequently, became liable to make reparation or restitution for the overcharge which it had collected.

V. This Court has expressly decided that the proper measure of damages, in the case of discrimination, is the amount of the rebate allowed to the favored shipper.

Union Pacific Ry. Co. v. Goodridge, 149 U. S., 680, 697.

That was an action at law, to recover treble damages, under a statute of Colorado, for an alleged unjust discrimination in freights upon coal. The statute, as the Court observed (p. 687), was "of the same nature as the Interstate Commerce Act"; and it provided (p. 681) that any railroad corporation that violated the Act should be liable for "three

times the actual damages sustained." The complaint demanded as damages three times the amount of the rebate allowed to a single favored shipper (the Marshall Coal Co.); and, after a trial, a verdict was rendered for this amount. One of the grounds of error assigned was that there was no sufficient evidence to sustain the amount of damages. As to this point, the Court said, in an opinion written by Mr. Justice BROWN (p. 697) :

"The seventh and last assignment of error was to the action of the Court in refusing to grant a new trial, and in entering a judgment on the verdict, because there was no sufficient evidence to support the verdict, and especially to sustain it as to the amount of damages. Plaintiff's evidence had shown that the Marshall Company have been receiving a rebate on all coal transported by it to Denver, which was not allowed to its competitors in business, and the damages sustained by the plaintiffs were measured by the amount of such rebate, which should have been allowed to them. The question whether they lost profits upon the sale of their coal by reason of the non-allowance of such rebates was too remote to be made an element of their damages. They were entitled to the same terms which the Marshall Company would have received, and damaged to the exact extent to which the Marshall Company was given a preference."

VI. The same conclusion was reached by the Circuit Court for the Northern District of Ohio.

Hays v. Pennsylvania Co., 12 Fed., 309.

The Supreme Court in Missouri reached a similar conclusion, under the provisions of a statute which made it unlawful for a railroad company to charge more for a short than for a long haul.

Seawell v. C. F. S. & M. R. R. Co., 119 Mo., 222.
McGrew v. Mo. Pac. Ry., 230 Mo., 496.

In the former case, the Court said (p. 245) :

"Why should not his damages be measured by the exact extent to which shippers from the latter point were given a preference? We cannot see any other practical standard by which his damages could be measured or that this instruction was erroneous."

In the McGrew case, the Court said (p. 547) :

"The measure of damages for doing the unlawful thing, in the absence of any statute on the subject, is the amount of the excess charged for the shorter distance over that charged for the longer distance."

Where a telegraph company charges one person a higher rate than it charges another, under similar conditions, the difference between the charges is the measure of damages which the one who is discriminated against is entitled to recover.

Western Un. Tel. Co. v. Call Pub. Co., 44 Neb., 326, 346.

At common law, in an action by a shipper against a carrier to recover damages for unreasonable or discriminatory charges, the measure of the damages was the difference between the excessive charge and the reasonable charge, or the amount of the rebate allowed to the favored shipper.

Cook v. Chicago Ry. Co. 81 Ia., 551.

EIGHTH.

The three Opinions of the Court below.

Two opinions were written in the present case by the Circuit Court of Appeals, one after the original argument, and a supplemental opinion after a rehearing (113, 151; 211 Fed., 785, 802).

The reasoning and conclusions of the Court in these opinions followed and elaborated the conclusions previously reached by the Court, upon substantially the same facts, in the case of the Lehigh Valley Railroad Company v. Clark (207 Fed. 717).

A better comprehension of the two opinions in the cases at bar will, therefore, be obtained by first considering the opinion in the Clark case.

NINTH.**The Opinion in Lehigh Valley R. Co. v. Clark.**

The question in the Clark case (207 Fed., 717) was solely one of unreasonable rates. There was no question of discrimination. The shippers complained to the Commission that the tariff rate on pyrites cinder was excessive. After a hearing, the Commission found that the rate charged was unreasonable; and it fixed a reasonable rate for the future, which the railroad companies adopted; but the Commission at that time declined to award any reparation.

Several months later, after the railroad companies had put the new rate into effect, the shippers applied for a rehearing on the question of reparation; which was granted. After the hearing, the Commission "*made a finding*" and ordered the defendant Companies to make reparation to the petitioners" (p. 719), in an amount specified. The findings made were that the rate collected "was unjust and unreasonable to the extent that it exceeded the subsequently established rate of \$1.45 per gross ton", and that the plaintiffs were entitled to reparation in a sum representing the difference between the excessive rate and the rate found to be reasonable, computed on the amount of the shipments (pp. 726, 729).

The Railroad Company failed to comply with the order of reparation; and an action was commenced under Section 16 to recover, as damages, the amount awarded. Upon the trial, the only evidence introduced was the two reports and orders of the Commission and proof that the awards had not been paid (p. 725).

The jury rendered a verdict in favor of the plaintiffs, for the amount that had been awarded by the Commission. The judgment entered upon this verdict was reversed by the Circuit Court of Appeals, upon the following grounds (p. 732):

1. That there were no sufficient findings of fact in the reports, as required by the statute.
2. That it was doubtful whether the findings contained in the original report could be considered in connection with the second report and the order of

reparation (p. 727), but if they could be considered, the findings were not sufficient to support the plaintiff's claim or make out a *prima facie* case of damage.

The Court thus held, that where, after a hearing, the Commission has found that an unreasonable rate has been charged and collected and has also found what would have been a reasonable rate, and the amount of the shipments, these findings are not sufficient to support an order directing an award to the extent of the difference and do not make out a *prima facie* case of liability for the damages awarded.

I. The extremely critical attitude of the Court towards the question under consideration is seen in its reluctance to concede that the findings contained in the original report of the Commission could be considered subsequently, in making the award of damages (p. 727).

It would add very much to the labors of the Commission and to the expense and time involved in hearing complaints, if the findings made in one stage of a proceeding could not be relied upon in a later stage of the same proceeding, between the same parties, in ascertaining the damages to be awarded.

A very different view of the subject is entertained by this Court. Not only is it proper for the Commission to consider the findings previously made by it in the same proceeding where all the parties before it were heard, but it may take notice of results reached by it in other cases, where other parties were before it, when its doing so is made to appear in the record and the facts thus noticed are specified.

United States v. B. & O. Ry., 226 U. S., 14, 20.

II. The critical disposition of the Court below is also evidenced in its unwillingness to concede that the Commission had made any findings of fact in the Clark case ; and it refers slightly to the findings, and characterizes them as "statements" (p. 732) and as "supposed findings" (p. 728).

III. The point of view of the Court is further seen in its disposition to criticise the plaintiffs for having presumed to rely upon the findings awarded by the Commission as making out a *prima facie* case, instead of proving the facts in the manner required in an ordinary action at law.

On this subject, the Court comments as follows (p. 732) :

"The plaintiffs were not bound to rely upon *prima facie* evidence. The whole field of inquiry was open to them * * * the production of such testimony as could be found bearing upon the issue."

In other words, the plaintiffs should not have availed themselves of their statutory rights, but should have tried out the entire case *de novo*.

IV. What the Commission actually found in its original report in the Clark case was (p. 726), that the rate on iron ore was \$1.45 per ton and that the rate on the cheaper commodity in question (pyrites cinder), which had been \$2 per ton, "should not exceed the rate on iron ore."

It made an order, accordingly, which was complied with by the carriers. Thereupon, after a rehearing on the question of reparation, the Commission made this finding, or "statement" as the Court preferred to call it (p. 726) :

"We now find, that the rate of \$2 per gross ton assessed and collected by the defendants on the shipments giving rise to complaint, was unjust and unreasonable to the extent that it exceeded the subsequently established rate of \$1.45 per gross ton. Complainant is entitled to reparation on all shipments moving within the period of the statute of limitations ;"

and then followed specific awards against the different Companies, based on the tonnage (pp. 726, 729).

What more was required to sustain an award of damages than the findings that the rate was unreasonable, the reasonable rate, and the amount of the shipments ? These facts establish a violation of the statute and a consequent liability under Section 8 ; and the shipments furnish the basis for the amount of damages awarded.

V. The fundamental error of the Circuit Court of Appeals, in the Clark case, was in holding that, in an action under Section 16, the damages must be proved and established in the same manner as if the action had been brought in the District Court in the first instance, without previously applying to the Commission. This is made evident from the fact that the

Court cited the International Coal Company case (230 U. S., 180) as a controlling precedent, decisive of the questions raised in the Clark case. Thus, it said of the decision in that case (p. 730) :

“ By it, the pivotal question involved in this case has, we think, been authoritatively and finally disposed of ”;

and, again, on the same page, referring to the same decision :

“ The question here raised is in principle *precisely* that raised in the present case.”

As heretofore stated (*ante*, p. 24), the International Coal case was an action at law for damages resulting from unjust discrimination, *without a previous application to the Commission*. This Court held, what it stated to be elementary, that, in an ordinary action at law for damages, the fact that damages were sustained must be both pleaded and proved, and that neither had been done in that case. In the Clark case, the facts were duly pleaded, and the proof, which was entirely lacking in the International Coal case, was supplied in the findings of the Commission. There was, therefore, no question of either pleading or proof. The “ pivotal ” question in the Clark case was whether the finding of the Commission constituted *prima facie* evidence under Section 16 ; in other words, the question was one of the construction of Sections 14 and 16 ; but no such question was involved in the International Coal case, which had been commenced without previous application to the Commission and in which no evidence of any kind as to the damages was given. In spite of this obvious distinction between the two cases, the Circuit Court of Appeals said (p. 730) that there was “ no distinction in principle ” between them.

VI. In holding that the decision of this Court in the International Coal case was controlling, the Circuit Court of Appeals showed such an utter misconception of the real question involved, that it is, perhaps, superfluous to call attention to other misconceptions equally misleading. It may be worth while, however, to refer to some of these, as they appear in exaggerated form in the two opinions in the cases at bar.

1. The findings of fact were not in the form required by the statute (pp. 727, 732). This view was emphatically expressed and elaborated by the Court in the two opinions in the cases at bar, which will be referred to subsequently (*post*, pp. 39-40).

2. The Court apparently entertained the mistaken view that the findings required by the statute are not the ultimate findings of fact upon which a judgment for damages can be based, but that they should include the evidence upon which such findings are made, as it said (p. 727) :

"What this additional *evidence* was, or what were the facts which the Commission found established by it, is nowhere stated in the report; so that we have nothing in the way of the findings of fact required by the statute."

This view, that the reports should contain a consideration of the facts and a statement of the evidence leading to the ultimate findings of fact, was severely criticized by the Court itself, in the cases at bar; and the inclusion of the evidence was pronounced to be highly objectionable (p. 728).

3. The Court was of the opinion that the findings upon which the award was made must be included *in the order*, as it said (p. 728) :

"It is only as to the *facts contained in the order* that the order is *prima facie* evidence."

It thus ignored the explicit language of Section 14 of the Act, that the findings are to be included in the report. No findings of fact are required by the statute to be included in the order. It is to be noted, however, that, in the cases at bar, the findings were repeated in the order of reparation, which contains the following recital (*20) :

"And the Commission having on the date hereof, made and filed a supplemental report containing its findings of fact and conclusions thereon, *which said report is hereby referred to and made part hereof.*"

4. Even though findings of fact upon which an award of damages are made are properly included in the report, and even though an order of reparation is therewith made by the Commission, the Court below held that the findings and order do not establish a *prima facie* case of liability for damages under Section 8, in an action under Section 16. Upon this point, it said (p. 729) :

"The orders themselves of the Commission are not *prima facie* evidence as to the question of liability in a judicial proceeding ;"

and the Court was clearly of the opinion that independent proof, in addition to the findings, must, in all cases, be given of the damages sustained, as it said (p. 724) :

"In the prosecution of such a suit (under Section 16), the plaintiff may avail himself, without further proof, of the conclusive administrative finding or order of the Commission, that the defendant was guilty of the violation of the Act complained of, but *must prove the actual damages incurred by him by reason of such violation.*"

That this was the deliberate conclusion of the Court is made still clearer by its assertion that the award of reparation is not *prima facie* evidence of anything (p. 723) :

"Though the award of damages by the Commission, following its finding of fact that a given rate was unreasonable, may be proved as the basis or condition precedent to the institution of a suit for damages authorized by the statute, it is not capable of enforcement as an administrative order, and is *not of itself* evidence of liability, *prima facie* or otherwise, in any judicial proceeding."

5. The Court was also of the opinion that the order of reparation is *prima facie* evidence only of the facts therein stated (p. 723); and it held that, as no fact was

stated in the order, the order was not *prima facie* evidence of anything.

In this it ignored the fact that the findings were contained in the reports of the Commission (p. 726) and that the statute does not require any findings to be included in the order, which is similar to a judgment following the verdict of a jury.

6. So far does the reasoning of the Court carry it, that it is moved to say (p. 728) :

" It does not at all follow, as plaintiffs seem to be under the impression that it does, that because the Acts make certain findings of fact *prima facie* evidence of such facts, it also determines their probative force."

In making this statement, the Court apparently did not stop to consider the meaning of *prima facie* evidence. *Prima facie* evidence of a fact is such evidence as is sufficient to establish the fact, unless rebutted.

Kelly v. Jackson, 6 Pet., 622, 632.

In making the findings and order *prima facie* evidence, the Act, therefore, does determine their probative force, in case the defendant produces no evidence in rebuttal. In considering the effect of orders of reparation, this Court has expressly recognized, in the Mitchell Coal case, that the orders are *prima facie* evidence of the amount of damages.

Mitchell Coal Co. v. Pennsylvania Co., 230 U. S., 247.

In that case, the Court said (p. 258) :

" Such orders, so far as they are administrative, are conclusive, whether they relate to past or present rates, and can be given general and uniform operation ; since all shippers who have been or may be affected by the rate can take advantage of the ruling and avail themselves of the reparation order. They are quasi-judicial, and only *prima facie* correct in so far as they determine the fact and amount of damage."

The reason for requiring the Commission to make an order directing the payment of damages and for making that award *prima facie* evidence of the damages sustained, was not only that, after a hearing, an experienced body like the Commission, familiar with the business of carriers and shippers, can estimate the damages sustained much more intelligently and fairly than an ordinary jury, but, principally, because only in this manner would uniformity be made possible (*see ante*, p. 23).

Congress clearly intended that the award should be conclusive on the question of the amount of damages, if the defendant did not exercise its constitutional right of attacking it ; because it expressly recognizes, in Section 16, that the action is "for the enforcement" of the order of reparation.

7. The Court stated, as one of its conclusions (pp. 724-5), that it did not necessarily follow, where an unreasonable rate had been charged, that the complainant had sustained damage or that the damage was the difference between the abrogated and the reasonable rate.

That may be true ; but the conclusion of the Court, based upon this statement, is not sound, namely, that because the damages awarded in that case did represent the difference between the rate abrogated and the reasonable rate, therefore, the award was not *prima facie* evidence of the liability in an action under Section 16. The damages may be the difference in the rates and, presumptively, they are so ; and where, as in the Clark case and in the cases at bar, the evidence before the Commission is not produced on the trial, the Court certainly cannot say that the damages were not properly awarded by the Commission or that the award was not supported by the evidence, or was made on an erroneous theory.

VII. The final conclusion of the Court below, in the Clark case, has already been referred to (*ante*, p. 29), namely, that the findings were not sufficient to support an award of damages (p. 722).

A ready test of this is to consider the procedure that would

be required in a common law action, in the absence of any statute on the subject. In such an action, the facts which it would be necessary to set forth in the complaint would be the shipments, the rates charged, that such rates were unreasonable and to what extent, and that the plaintiff sustained damages. These are the facts that would be submitted to the jury ; and if the jury found them in accordance with the allegations of the complaint, it would be required to return a verdict in favor of the plaintiff for the damages sustained ; and its verdict might be for the difference between the rate extorted and the reasonable rate.

Under the Act to Regulate Commerce, the award of damages takes the place of the verdict of the jury ; and findings that would support a verdict in an action at law would support an award of the Commission under the Interstate Commerce Act. The only findings that the Commission is required to make are the ultimate findings, upon which liability at law may be predicated.

Int. Com. Com. v. L. & N. R. Co., 227 U. S., 88, 91.

TENTH.

The first Opinion of the Court below in the cases at bar.

I. The same critical attitude of the Circuit Court of Appeals, noticeable in the Clark case, is also indicated in the cases at bar.

1. Although the second proceeding, to recover the damages for the unreasonable rates charged subsequent to July, 1907, was decided at the same time as the first proceeding, and upon the same evidence, the Court calls attention (*264) to the fact that the report in the second case did not include the findings of the original report, although the finding of unreasonableness is expressly made on the basis of the previous decision ;

and it raises the question as to whether it was competent for the Commission to do this.

2. The Court parenthetically and disparagingly observes (*243), that the theory of the petition seems to have been to enforce an order of reparation, not to recover the damages sustained, although, in its statement of the facts, it had previously recognized the fact (*237) that the plaintiff had instituted a suit, under Section 16, "to recover damages alleged to have been incurred."

The causes for which the plaintiff claimed damages were set forth in the petition, and also "the order of the Commission in the premises", as required by Section 16; and, as issue was joined by the service of a plea (75), the mere form of the demand for relief became immaterial.

Bell v. Merrifield, 109 N. Y., 202, 207.

In asking that the order of reparation be enforced and that the plaintiff be given the relief to which he might be entitled on the facts stated and for judgment for a sum specified, the plaintiff did everything that even a special pleader at common law would have considered necessary. The damage being, *prima facie*, that found by the Commission, to which the plaintiff is entitled if no rebutting evidence be given, it is reasonable and proper that the pleader should demand judgment accordingly; and that was recognized by this Court in the Abilene Cotton Oil case (204 U. S., 426), where the Court said (p. 438) :

"In the event of the failure of the carrier to obey the order of the Commission * * *, the party in whose favor an award of reparation was made was empowered to compel compliance by invoking the authority of the courts."

In *Robinson v. B. & O. R. Co.* (222 U. S., 506), this Court said (p. 509) :

"Provision was also made for the enforcement of the order of reparation by an action in the Circuit Court of the United States, if the carrier failed to comply with it."

In Great Northern Ry. Co. v. United States (208 U. S., 452), the Court said (p. 468) :

"Now, Section 16 of the prior Act to Regulate Commerce, as amended and re-enacted by Section 5 of the Hepburn Law, prescribes a limitation of two years 'from the time the cause of action accrues' as to 'all complaints for the recovery of damages' before the Commission, and establishes a limitation of one year for the filing of a petition in the Circuit Court for the enforcement of an order of the Commission for the payment of money."

The exact language of the statutory provision thus referred to is that contained in the last sentence of the second paragraph of Section 16, namely :

"A petition for the enforcement of an order for the payment of money shall be filed in the Circuit Court or State Court, within one year from the date of the order, and not after."

The practice in the present cases, in asking for the enforcement of the orders of reparation (No. 434, *12; No. 455, *9), was, therefore, technically and exactly correct.

3. The Court indulges in italics (see 211 Fed., 796) in commenting upon the fact that the Commission does not, in its supplemental report requiring reparation to be made, include the evidence upon which its conclusion was reached (*255). But, later (*258), it refers impatiently to the original report as "this long report," this "voluminous report," "which in itself constitutes a fair sized book" (only 32 pages of the present record ; 16-48) ; and it complains that the report contained (*256) "a mass of recited evidence, statements, opinions and conclusions of the Commission, all of which were irrelevant to an award of actual pecuniary damage."

II. In its original opinion in the present cases, the Court made it still more clear than it had done in the Clark case, that the findings of fact must be of a formal kind, distinct from the report itself, and that it is not a sufficient compliance with the statute that the findings are included in the report, in spite of the express language of Section 14, that "such re-

port shall *include* the findings of fact on which the award is made."

On this point, the Court below said (*252) :

"The imperative command of Section 14, that in case damages are awarded, such report shall include the findings of fact on which the award is made *evidently contemplated a distinct enumeration of such findings* by the Commission, with reference to their proposed use in a jury trial."

And, later, the Court, in referring to the findings in the cases at bar, said (*255-6), that "the requirement of Section 14 * * * has not been complied with by any *express* findings of fact in the supplemental report," but must be looked for, if at all, "in the voluminous pages of the original report," in which "there are no findings of fact *as such*;" but they must be gathered from a mass of matter irrelevant to an award of damages.

This attitude is somewhat surprising, in view of the fact that, in the original report, the Commission, after considering the evidence relating to unjust discrimination, held, in a single sentence (*36), that the complainants had sustained the allegation in that respect and that reparation should be awarded; and, after considering the question of the reasonableness of the rates subsequent to August 1, 1901, the Commission expressly found, at the very end of the report (*72-3), that the rates were unreasonable to the extent specified and that complainants were entitled to reparation, which would be made upon further evidence.

It is difficult to understand how the findings could have been made more clearly or concisely, or why, if "a distinct enumeration" of the findings is contemplated by the statute, this was not done in the present cases.

III. The Court below was greatly disturbed by the heavy burden which was thrown upon the jury, by reason of the fact that the reports were admitted in evidence as a whole, and not merely the specific findings upon which the award of damages was based; and, in its earnestness on this point, it said (*288) :

"No function of a trial judge in such case could be more exigent than that of pointing out to a jury, in a

case where no separate and distinct findings of fact have been made in the report of the Commission, what would properly be considered such findings."

And again (*292) :

"The jury would, therefore, be compelled to examine the voluminous report to discover for themselves whether it contained any findings of fact bearing upon the question as to what actual damages had been suffered by the plaintiff."

Finally, the Court reached the conclusion (*294), that the trial Court had failed in its duty to the jury, in not pointing out the portions which alone could be considered as findings of fact, and that the report should, therefore, not have been received in evidence.

The Court thought (*295) that it made no difference that counsel for the defendant (plaintiff) "read to the jury what he stated to be material portions of said exhibits"; because it did not appear what portions were so read; but the record shows that no objections were made to the reading of these portions (*138).

The Court (*295) "looked in vain for any directions by the Court to the jury in regard to this important matter." After quoting from the Judge's charge, the Court continued (*297) :

"There is no attempt here or elsewhere in the charge to separate from the mass of statement in the report what might be considered findings of fact or to instruct the jury that the statute, in making such facts *prima facie* evidence of the facts stated, leaves the evidential value of such facts to the jury. On the contrary, as will be seen in the above extracts from the charge, the Court gave the jury to understand that the report and findings of the Commission as to discrimination and unreasonableness, and the award of damages made thereon, were *prima facie* evidence of the plaintiff's case and of the liability of the defendant and conclusive upon the defendant, unless he could rebut the same. In this, we think the court was clearly in error."

If the defendant had given any evidence tending to rebut the findings of the Commission, including the finding of the

amount of damages, there might be some point to all this warmth of criticism. But as there was no evidence given in rebuttal, the question became one purely of law, namely, whether the findings and order were properly made by the Commission in accordance with the requirements of the statute. If they were, then, in the absence of other evidence, they established the fact of the violation of the Act and the amount of damages sustained ; and, as there was nothing for the jury to pass upon, it was not necessary to leave anything to the jury. The Court should have directed a verdict in favor of the plaintiff, for the full amount awarded by the Commission, as was done in Baer Bros. v. D. & R. G. R. Co. (233 U. S. 479, 484) ; and if a verdict had been rendered in favor of the defendant, the Court would have been obliged to set it aside, as contrary to the evidence.

Here again, as in the Clark case, the Court totally misconceived the effect of *prima facie* evidence that had not been rebutted. How glaring this misconception was is apparent from the following statement of the Court (*262) :

“The statute makes the finding or order *prima facie* evidence of certain facts ; but it does not make or attempt to make such facts *prima facie* evidence of anything.”

If the facts found constitute a violation of the Act by the carrier, then these facts and the award of damages therefor, if not rebutted, become evidence of *everything* requisite to the plaintiff's recovery.

ELEVENTH.

The supplemental opinion of the Court below, after the reargument.

I. The critical attitude of the Court continues to be manifested in the supplemental opinion, as, for instance, where the Court, in considering the effect of the provision of Section 16

making the findings and order *prima facie* evidence, says (*314) :

"This *prima facies* of the facts found is an advantage of considerable moment to the plaintiff. It is an expressed exception to the ordinary rule of evidence and should not be extended by implication. It must be confined to the precise meaning of the language of its enactment."

That is not the view entertained by this Court, which has held that the Act is remedial, so far as the questions involved in the cases at bar are concerned, and is to be given a liberal construction. As the Court observed, in the case of the New Haven Railroad Company v. Interstate Commerce Commission (202 U. S., 361, 391), in an opinion written by Mr. Justice WHITE, the great purpose of the Act to Regulate Commerce was to destroy favoritism, by preventing unjust rates; and, as to this, the Court said (p. 391) :

"To this extent and for these purposes, the statute was remedial and is, therefore, entitled to receive that interpretation which reasonably accomplishes the great public purpose which it was enacted to subserve."

Moreover, *prima facie* evidence is not an "exception to the ordinary rule of evidence," as the Court below asserted. It is one of the elementary rules of evidence recognized at common law. All legal presumptions of facts, of which the number is limitless, constitute *prima facie* evidence thereof.

4 Wigmore on Evidence, Sec. 2490.

II. That the Court below had some misgivings as to the conclusions reached by it in its original opinion and as to the arguments advanced by it in support of those conclusions, is apparent not merely from the fact that it granted a rehearing but from the further extended discussion of the subject contained in the ten pages of its supplemental opinion (151-160). In this supplemental opinion, the Court is carried by the force of its reasoning to the extreme and radical conclusion, that the findings of the Commission and the order of reparation can, under no circumstances, make out a *prima facie* case of

liability in favor of the plaintiff for the damages sustained, but that affirmative proof of such damages must, in every instance, be given. This is asserted in spite of the specific provision of the statute (Sec. 16) :

" Such suit * * * shall proceed in all respects like other civil suits for damages, *except* that, on the trial of such suit, the findings and *order* of the Commission shall be *prima facie* evidence of the facts therein stated."

And yet, it was of this language that the Court below said (*317) :

" It would seem almost an abuse of language to say that the 'facts' of which the findings and order of the Commission are *prima facie* evidence, include the conclusions arrived at by the Commission as to the injury of the plaintiff and the amount of damages sustained."

III. How the Court reached this astonishing conclusion, it is not easy to ascertain from its discussion of what it considered to be "the crucial questions raised by the petition for, and argument at, the rehearing" (*304). Its main fallacy, to which it devotes most of its attention, is in its discussion of the question of damages. This question it treats, not as one of the construction of Sections 14 and 16, on a point of evidence, but as a pure question of damages, independent of the statute, in the same manner as if it had arisen in an action at law, without previous application to the Commission. The Court discusses the question precisely as if the award by the Commission had not been made. It thus disregards the award and reduces its effect as evidence to a nullity.

The Court misapprehended the position of counsel for Meeker & Co., in its statement (*311, *315) that counsel claimed that, where the rates had been found by the Commission to be unreasonable, the damages, "as a matter of law", must be the difference between the rate charged and the rate found to be reasonable. That is not the contention of counsel for Meeker & Co. While, for the reasons heretofore stated (*ante*, pp. 20-24), they believe that the difference between the rate extorted and the rate that should have been charged

properly represents the liability of the carrier to the shipper, yet it is not necessary for them, in the present cases, to maintain that proposition. It is sufficient for the present discussion if the difference between the two rates *may* represent the reparation which the carrier should make; and, indeed, it is sufficient unless it is the law that the difference between the two rates, that is, the amount of the overcharge, can *never* represent the liability of the carrier. For, if the Commission is at liberty, in a single instance, to award reparation in the amount of the overcharge, then the award becomes *prima facie* evidence of the amount of the liability under Section 16. This distinction between the proof required in an action at law, without previous application to the Commission, and in an action under Section 16, after an award has been made by the Commission, is entirely lost sight of in the supplemental opinion of the Court.

The Court also misapprehended the contention of counsel for Meeker & Co., in stating (*307-8) that they seemed to argue that the Act created a "general" liability (meaning a liability in favor of the general public) as soon as a violation of it was shown. Counsel have never contended, nor have they ever entertained the remotest notion, that a violation of the Act creates a liability in favor of any one, except, as expressly stated in Section 8, "the person or persons injured thereby". It is their contention, however, that if the Commission finds that a shipper has been charged unreasonable or discriminatory rates, that finding creates a liability in his favor against the carrier, under Section 8, and that it is a liability even if the Commission does not award any damages by way of reparation. If no award is made, the case is the ordinary one of nominal damages, that is, it is the familiar case of *damnum absque injuria*.

IV. What the Court states (*308-10) on the subject of the right to maintain an action for the damages occasioned by a direct violation of the statute, without previous application to the Commission, except where the question of the reasonableness of the rates is involved, is undoubtedly sound; but it has nothing to do with the questions involved in these cases, because the Commission was first appealed to and did find that the rates were discriminatory and unreasonable.

V. The Court below laid great stress upon the provision of Section 18, that the suit "shall proceed in all respects like other civil suits for damages" (*313); and it argued from this that the jury must, in all cases, assess the damages, even though there has been an award by the Commission, made upon proper findings, showing a statutory liability on the part of the carrier. It disregarded the exception, which makes the findings and order *prima facie* evidence of the facts; and it attempted to justify this by the following reasoning (*313):

"Such facts may or may not be relevant to the question of the liability for or amount of damages claimed. Their evidential value in this respect is for the Court *and jury* trying the case."

And again (*317):

"The sixteenth Section nowhere says that the report, findings or order of the Commission are *prima facie* evidence of the liability of the defendant or of the amount of such liability. It only says, and we must again refer to its exact language, that the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated. But, clearly, such facts are not made *prima facie* evidence of anything. Their evidential value is for the Court *and jury* to determine. They may or may not be sufficient to make a *prima facie* case, or they may, in the opinion of the Court *or jury*, be of any greater or less degree of probative force."

This is merely a more emphatic elaboration of the statement which was made in the original opinion (*288):

"The pertinency and evidential weight and value of the facts as to which the findings and order are *prima facie* evidence, are for the determination of the Court *and jury*, as in other civil cases. They may or may not make out a *prima facie* case for the plaintiff."

The Court was clearly in error in supposing that there was anything for the jury to consider in a case, such as this, where no rebutting evidence is offered by the defendant. In that case, where there is no conflict of evidence, the questions in-

volved become purely questions of law for the determination of the court. These questions are, whether the findings are in proper form, whether they are supported by any evidence, and whether, if so, they show liability under the statute justifying an award of damages. In the cases at bar, the defendant was not at liberty to raise the point that the findings were not supported by any evidence, because it did not choose to offer in evidence the record of the proceedings before the Commission. The discussion of the evidence by the Commission, however, contained in the original report, shows that there was abundant evidence to support the findings. The only legal question involved in the present cases, therefore, was whether the findings made out a case of liability under Section 8. The Circuit Court of Appeals gave its own answer to this, when it said (*315) :

"In the present case, we have the unquestioned findings of the Commission, that the rates charged were unreasonable and that a certain lower rate was reasonable."

And, in its original opinion, it also recognized that the Commission had found that discriminatory rates had been charged in 1900 and 1901, and that there had been specific findings of fact of the "undisputed tonnage" shipped by complainants (*293-4).

The facts thus found constituted a clear violation of the Act, which the trial Court could not ignore. Indeed, in its original opinion, one of the propositions formally laid down by the Circuit Court of Appeals was that (*272, *287-8) "the finding by the Commission that a given rate is unreasonable * * * establishes a violation of the Act". And when, upon the facts thus found, the Commission made an award of damages, such award constituted an additional finding of fact of the damages sustained, which the trial Court was not at liberty to leave to the consideration of the jury, if it was not controverted by the defendant.

To say, as the Circuit Court of Appeals did, that the facts found "are not made *prima facie* evidence of anything", is to disregard the explicit language of the statute; and to say that "their evidential value is for the Court and jury" to determine, is not only to hold that the jury has the right

to pass upon questions of law, but it is opposed to the positive provision of Section 16, that these facts shall be *prima facie* evidence ; which means that they become controlling evidence, entitling the plaintiff to judgment, if not rebutted.

VI. The Court below assumed, throughout its entire argument, that the award of damages is not a finding of fact but is a conclusion of law, having no probative force whatever ; but, as heretofore stated, the award of damages is necessarily a finding of fact. When the Commission refuses to make an award, that is a finding that, in its opinion, no damages have been sustained. When it makes an award, that award constitutes its finding of the damages, in precisely the same manner as does the verdict of a jury.

13 Cyc., 233.

This obvious and elementary principle was recognized by the Court below, in another connection, when it said (*318) :

“ What those damages may be *is a question of fact*, to be determined by the jury, and not a question of law.”

VII. The reasoning of the Court below is based upon the proposition, that there is a fundamental difference between the facts found by the Commission showing a violation of the statute and a consequent liability on the part of the carrier, and the fact of the damages sustained. But there is no such difference. The Court asserts (*316), that Congress intended to preserve the right to a jury trial secured by the Seventh Amendment ; and it assumes that the shipper would be deprived of this right if the award of the Commission were made *prima facie* evidence of the damages ; and it argues that to hold otherwise would make a “ mockery ” of the trial (*318), because the award would become conclusive, inasmuch as the liability represents the overcharge.

As heretofore pointed out (*ante*, pp. 44-5), the liability is not necessarily the difference between the two rates. That depends upon the finding of the Commission in that respect ; and the award does not become conclusive, by being made *prima*

facie evidence of the damages sustained, unless the defendant fails to present evidence in rebuttal, any more than do the facts from which the liability arises.

In an ordinary action at law, the parties have just as much right to a jury trial upon the issues of fact claimed to constitute the liability as upon the amount of the damages resulting from the liability. Congress, therefore, had just as much right to make the finding of damages by the Commission *prima facie* evidence, in an action brought under Section 16, as the other facts from which the liability springs. Indeed, there was a greater reason for making the award *prima facie* evidence, not merely because the Commission, with its wide experience, could assess the damages more intelligently and consistently than an ordinary jury, but because it was desirable that all shippers, under similar conditions, should recover uniform damages and thus not be subject to the discrimination that would be inevitable if different juries were to assess the damages of different shippers. That was the powerful reason which led to the decision of this Court in the Abilene Cotton Oil case ; and it was emphasized recently in the Mitchell Coal case (230 U. S. 247, 255-6).

So important is the order of reparation, that an action cannot be maintained to recover damages for an unjust discrimination involving the question of reasonableness, without first obtaining an order of the Commission.

Robinson v. B. & O. R. Co., 222 U. S., 506.

The Court below seemed to regard it as unthinkable that an award of the Commission should be *prima facie* evidence of the damages sustained ; and it asks, with much feeling (*314) :

“ Is a defendant to be called upon practically to prove a negative and show that the plaintiff was not damaged or that the amount claimed was less than that stated by the Commission ? ”

The defendant is always called upon to do precisely that thing, where a *prima facie* case has been made out by the plaintiff.

VIII. The Court seemed to have difficulty in reconciling the fact that the award made in favor of a complaining shipper should be *prima facie* evidence in his favor, in an action under Section 16, but that such would not be the case with other shippers similarly situated (*310-11). Under the view taken by this Court in the case of the Mitchell Coal Company (230 U. S., 247, 255-7), the finding by the Commission that unreasonable rates have been charged and the further finding of what rates should have been charged, together with an order of reparation, enure to the benefit of all shippers under the same conditions; for, only in this manner, can equality among shippers be preserved. Thus, all shippers, as the Court stated in that case, "can take advantage of the ruling and avail themselves of the reparation order" (p. 258).

TWELFTH.

Some general observations on both Opinions of the Court below.

I. In both opinions in the cases at bar, as well as in the Clark case, the Court below held that the decision of this Court, in the International Coal case, was decisive upon it (*297-8, *318).

We have already shown (*ante*, pp. 24, 32), that the International Coal case has no bearing upon the question raised under Section 16 of the Act, *where there has been a hearing and an award by the Commission*.

II. The Court below ignored the fact stated by the Commission in its supplemental report (*19), that the Railroad Company had conceded that the award of the amount due was correctly made by the Commission, if the Company was liable for any damages at all.

III. Neither on the trial nor in the Circuit Court of Appeals, did counsel for the Railroad Company manifest any in-

tention to raise any question as to the amount or measure of damages. On the contrary, their objections to the admission of the reports and orders (60-71), and their assignment of errors (102-110), were based on the assumption that the statute did make the findings and order *prima facie* evidence, not only of the liability but also of the damages sustained, but that Congress had no power to give such effect to the findings. Thus, one of the objections to the admission of the order, and an assignment of error for overruling the objection (*221-2), was as follows (*113) :

“ We object to the order now offered, on the ground that the statute * * * is unconstitutional, in that it deprives the defendant of due process of law, it not being within the power of Congress to provide by legislative enactment that the Interstate Commerce Commission can make findings upon which there may be a claim for reparation of damages to a petitioner before that body, and then provide that on the trial of a suit to recover such alleged damages, the finding and order of the Commission shall be *prima facie* evidence of the facts therein stated.”

And again (*114) :

“ We object to the admission of the order, on the further ground that it appears on the face of the order, that the total amount ordered by the Interstate Commerce Commission to be paid was the sum of several amounts claimed, on several separate shipments of coal between November 1, 1900, and July 17, 1907; that each shipment is the basis of a separate cause of action, and the order is inadmissible as not specifying as to each the amount awarded by the Commission; that the order fails to state as to each shipment the amount found to be due by the Interstate Commerce Commission, and therefore, the order is not under Section 16 *prima facie* evidence as to any of the causes of action here sued upon.”

It was this question of damages, which counsel for the Railroad Company had not raised, upon which the Circuit Court of Appeals laid so much stress in its supplemental opinion and upon which, in the last instance, it was apparently disposed to rely for its reversal of the judgments; and

its original ground, that the findings did not comply with the requirements of the statute, was allowed to slip into the background.

The points that counsel for the Railroad Company did insist upon at the trial and in the Court below, were that the provision making the findings and order of the Commission *prima facie* evidence was unconstitutional, as it deprived the carrier of its right to a trial by jury (*96-7, *100, *107-8, *113), and that the Commission could not regulate or establish rates for the past but only for the future (*97-99).

The latter contention is answered by the decisions of this Court in the Abilene Cotton Oil case and in the Mitchell Coal case. The contention as to the unconstitutionality was answered by the Court itself, in its original opinion (*245).

IV. In holding that the findings and order did not make out a *prima facie* case of the extent of the liability for which the plaintiff was entitled to judgment, the Court below not only ignored the explicit provisions of Section 16 but also the provision contained in the first sentence of that Section, requiring an order to be made directing payment of the award. That order would be quite useless if it were given no probative force in an action. It would be idle to make an order, if the carrier could disregard it and compel the shipper to prove his damages in court, *de novo*.

V. The Act to Regulate Commerce was not only intended to prevent wrongs to shippers but to make their redress simple and inexpensive. But, on the theory of the Court below, the Act has had the contrary effect; for, instead of being able to proceed in court in the first instance, the shipper must now, at least where the rates are unreasonable, first proceed before the Commission and be at the expense, as in the present case, of a hearing upon the question of the damages sustained, while the finding of the damages by the Commission does not advance his claim for compensation in the slightest degree. Having been put to this delay and expense, he must then bring an action to try the question all over again. The language of the statute would have to be very clear and imperative to lead to such a conclusion. Moreover, such action by the shipper would destroy

all equality among shippers, as this Court pointed out in the Mitchell Coal case (230 U. S., 257).

VI. In every statute of regulation by a Commission, the procedure required for the orderly despatch of business inevitably tends towards a certain amount of formality and fixedness, which, if carried too far, will destroy one of the objects of the Act, which was to protect the public without constant resort to the courts. This tendency would be enormously increased, if the courts should construe the Act in the spirit shown by the Court below in the cases at bar. A shipper cannot establish the facts in a case such as this without a very heavy expenditure of time and money. The hearings in the present cases occupied about four years (#138); and the "voluminous exhibits", to which the Commission refers in its original report (#72), represented a condensed summary of the results obtained by expert evidence and the careful examination and consideration of a multitude of facts. Is it possible that all this is to go for naught, if the Commission fails to make its findings in some particular form, even though the statute does not prescribe the form, and that, without any fault on his part, the shipper is to be deprived of all relief (for that is what it would mean) because the Commission had failed to comply with some technical point of procedure, although its findings are clear and unambiguous and its award of relief is definite and unmistakable?

This Court has recently answered the question in Baer Bros. v. Denver & R. G. R. (233 U. S., 479, 488) :

"It would punish the shipper for the failure of the Commission. It would deprive him of his award of damages for his private injury, because of the Commission's omission to make a rate for the benefit of the public."

Obviously, the only reason for requiring any findings to be made is that the Court may see that there is a legal basis for awarding damages. But where the ultimate facts constituting the violation of the statute are found, the requirements of the statute are sufficiently complied with.

The modern tendency in legal procedure is for greater liberality in pleading and practice.

Baker v. Warner, 231 U. S., 588, 593.

That tendency will not be defeated by this Court by insisting upon technical procedure under an Act whose object was to simplify the practice in cases arising between shippers and common carriers.

VII. That the Court below was not convinced by its own reasoning, in the cases at bar and in the Clark case, is evident from the fact that it has certified to this Court, for its decision, in the case of *Pennsylvania R. Co. v. Jacoby & Co.*, two of the questions which it decided against Meeker & Co. in reversing the judgments in their favor, namely:

"(2) Were the finding and the order quoted above, or was either of them, *prima facie* evidence of themselves, or of itself, that the defendant had become liable to Jacoby & Co. in some amount by the discriminating practices referred to ?

(3) If the finding and the order, either or both of them, were *prima facie* evidence that the defendant had become liable in some amount, were they, or was either of them, *prima facie* evidence also of the amount of such damage ? "

The Court would certainly not have certified these questions, if it had not had great misgivings as to its conclusions in the Clark and Meeker cases.

Lau Ow Bew, 141 U. S., 583, 587.

THIRTEENTH.

The Statute of Limitations.

Among other amendments of the Interstate Commerce Act, made by Section 5 of the Hepburn Act of 1906 (34 Stat. L., 590), was the following amendment of Section 16 :

"All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues and not after, and

a petition for the enforcement of an order for the payment of money shall be filed in the Circuit Court or State Court within one year from the date of the order and not after; provided that claims accrued prior to the passage of this Act may be presented within one year."

The first proceeding before the Commission was instituted on July 17, 1907 (*10); and, as heretofore stated, the Commission awarded damages for unjust discrimination from November 1, 1900, to August 1, 1901, and for unreasonable rates from August 1, 1901, to the commencement of the proceeding. On the trial of the actions under Section 16, the trial Court overruled the objections of defendant's counsel to the recovery of any damages prior to July 17, 1905, that is, prior to a date two years before the commencement of the proceeding; the objection having been based on the ground that the amendment of 1906, above quoted, barred all claims existing at the time that were more than two years old (*110). But the Circuit Court of Appeals sustained the contention and held that it was "the evident intent of Congress" to preserve the two year limitation, both as to claims maturing before and after the amendment, and that the Commission, therefore, had no jurisdiction to entertain the claim of Meeker & Co. for any damages accruing prior to July 17, 1905 (*265-6). This view of the Court was adhered to in the supplemental opinion (*319-320).

The effect of the decision, in applying the two year statute, was to bar at least 75% of the entire amount of the claims of Meeker & Co., or approximately \$97,518.57 out of the total award of \$128,004.26.

I. In holding that the two year statute applied to claims existing at the time of the amendment, the Court reached a conclusion different from that which had long been recognized by the Commission.

Nicola v. L. & N. R. Co., 14 I. C. C. Rep. 199, 206; *Fels v. Penna. R. Co.*, 23 I. C. C. Rep., 483, 487.

The official ruling of the Commission on the subject, made for the guidance of shippers, was as follows:

"Claims filed with the Commission since August 28th, 1907 must have accrued within two years prior to

the date when they are filed ; otherwise they are barred by the statute. Claims filed on or before August 28th, 1907, are not affected by the two years limitation."

I. C. C. Conference Ruling, Bulletin No. 5, Rule 10.

II. This construction of the Act by the Commission has also been recognized by the Circuit Court of Appeals for the Sixth Circuit.

L. & N. R. Co. v. Dickerson, 191 Fed., 705, 711-12;

A. J. Phillips Co. v. Grand Trunk Ry. Co., 195 Fed., 12, 19.

III. Prior to the passage of the amendatory Act of 1906, there was no limitation in the Act to Regnlate Commerce; and the statutes of the various States were, consequently, held to be applicable.

Ratican v. Terminal R. Ass'n., 114 Fed., 666, 668; Carter v. New Orleans R. Co., 143 Fed., 99 (C. C.

A., 5th Circ.);

Lyne v. D., L. & W. R. Co., 170 Fed., 847.

Under the Pennsylvania statute, which was applicable to the claims involved in these actions, the limitation was six years.

Stewart's Purdon's Digest (13th Ed.), 2282.

IV. The decision of the Court below would render the amendatory Act of 1906 unconstitutional. Until the time of the passage of that Act, Meeker & Co. had an existing claim, which dated back to August, 1901, the date when the 65% contract was put into effect, making the rates retroactive to November, 1900 (*31).

According to the construction placed on the amendatory Act by the Court below, the entire claim of Meeker & Co. prior to July 17, 1905, was barred, although no time whatever had been given to them to assert their claim. It is thoroughly well settled, however, that a statute of limitations, in so far as

it applies to accrued rights of action, is unconstitutional, unless a reasonable time is allowed for their enforcement.

19 Am. & Eng. Enc. of Law (2nd ed.), 169-171 ;
 25 Cyc., 986 ;
 Cooley on Const. Limis. (7th ed.), p. 523 ;
 Black's Const. Law (2nd ed.), p. 498 ;
 Terry v. Anderson, 95 U. S., 628 ;
 Sohn v. Waterson, 17 Wall., 596.

When possible, a statute will always be construed in such manner as to render it constitutional.

Sohn v. Waterson, *supra*.

V. The error of the Court below upon this point was in disregarding the plain terms of the proviso, that claims which had accrued prior to the passage of the Act might be presented within one year. The importance of this proviso was noticed by this Court in Great Northern Ry. Co. v. United States (208 U. S., 452), where the Court, in discussing the limitation contained in Section 16, said, by Mr. Justice WHITE (p. 468) :

"Now Section 16 of the prior Act to Regulate Commerce, as amended and re-enacted by Section 5 of the Hepburn law, prescribed a limitation of two years 'from the time the cause of action accrues' as to 'all complaints for the recovery of damages' before the Commission, and establishes a limitation of one year for the filing of a petition in the Circuit Court for the enforcement of an order of the Commission for the payment of money. *But the Section contains a proviso, saving the right to present claims accrued prior to the passage of the Act, provided the petition be filed within one year.*"

VI. Some point was made by counsel for the Railroad Company, in the Court below, that the amendment took effect on June 29, 1906, and that, as the claim of Meeker & Co. was not filed until July 17, 1907, it was not filed within the year permitted by the proviso. The Court below was not impressed by this contention ; and it was without merit.

As the Commission pointed out in the Nicola case (Nicola v. L. & N. R. Co. 14 I. C. C. Rep., 199, 206), there are many

authorities holding that the phrase, "passage of this Act," refers to the time when the Act takes effect.

36 Cyc., 1197-8 ;
 26 Am. & Eng. Enc. of Law (2nd Ed.), 565 ;
 Matter of Howe, 112 N. Y., 100 ;
 Harding v. People, 10 Colo., 387 ;
 Patrick v. Perryman, 52 Ill. App., 514 ;
 Osborn v. Charlevoix, 114 Mich., 655 ;
 State v. Bennis, 45 Neb., 724.

Congress passed a Joint Resolution on June 30, 1906, as follows :

"The Act entitled, 'An Act to amend an Act entitled "An Act to Regulate Commerce", approved February 4th, 1887, and all other Acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission', shall take effect and be in force sixty days after its approval by the President of the United States."

34 Stat. L., 838.

The title of this Joint Resolution was as follows :

"Joint Resolution (S. R. 72), fixing the date upon which the Act to amend an Act entitled 'An Act to Regulate Commerce', approved February 4th, 1887, and all other acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission', approved June 29th, 1906, shall go into effect."

The purpose of this Joint Resolution was, as stated in its title, *to fix the date* upon which the amendatory Act should go into effect; and the time thus fixed was "sixty days after its approval by the President of the United States". This approval was given by the President on June 30, 1906; and sixty days thereafter would be August 28, 1906. Consequently, one year under the proviso within which the present accrued claims would not expire until after July 17, 1907, when the original complaint was made to the Commission.

A Joint Resolution, approved by the President, has all the force and effect of a bill.

8 Fed. Stats. Ann., 338 ;
 Story on the Constitution (5th Ed.), Sec. 892 ;
 6 Opinions of Attys. Gen. 680.

The purpose of the Joint Resolution of June 30, 1906, is obvious. The amendment provided that it should take effect immediately; but the machinery for putting it into effect could not be immediately provided, and there was no time for passing an Act amending this clause. The Joint Resolution was consequently adopted, with the same effect as a formal amendment. Even assuming that the Amendment became a law on June 29, 1906, its operation was certainly suspended for sixty days by the Resolution, and its effective date, by the specific terms of the Resolution, was made sixty days later (August 28).

Moreover, the limitation was that "claims accrued prior to the passage of this Act may be presented within a year." Within a year from what date? Clearly within a year after the Act became effective, so that claims could be presented under it. Certainly, after the Joint Resolution had been approved on June 30, no claims could be presented under the Amendment until August 28; and surely Congress did not intend that the sixty day extension should curtail the time allowed for the presentation of accrued claims.

FOURTEENTH.

Attorneys' fees.

The trial Court fixed and taxed, as part of the costs, the attorneys' fees both for services performed in the proceeding before the Commission, in each case, and for those in the two actions. (No. 434, *212; No. 435, *120). These amounts were determined upon presentation of the record of the proceedings before the Commission and upon the oral statements of plaintiff's counsel in open Court, without objection. The Circuit Court of Appeals did not pass upon the question of the allowance of these fees.

I. Upon the review of the judgments in the Court below, counsel for the Railroad Company did not print the Record before the Commission, nor insert in it the oral statements

made by plaintiff's counsel for the information of the Court in fixing the fees. The plaintiff in error was, therefore, not at liberty to question the amounts allowed by the Court for the attorneys' fees.

II. Section 8 of the Act to Regulate Commerce provides that if any common carrier does an act prohibited or declared to be unlawful, it shall be liable to the person injured for the damages sustained, "together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case." Section 16 of the Act, providing for an action to be brought after the entry of the order of the Commission awarding damages, further provides that "if the petitioner shall finally prevail, he shall be allowed a reasonable attorney's fee, to be taxed and collected as part of the costs of the suit."

In the Court below, it was the contention of counsel for the Railroad Company, that, where an action is brought under Section 16 to recover damages awarded by the Commission, the court, in fixing the attorney's fee, is limited to the services rendered in that action, and has no power to fix a fee for services rendered in the proceeding before the Commission.

III. Even if it should be conceded, for the sake of the argument, that the attorney's fee specified in Section 16 was intended to apply only to services rendered in connection with the action in which the judgment is obtained, that would not preclude the court from taking into consideration the services previously rendered before the Commission; because, the preliminary application to the Commission is always proper, and, in the case of unreasonable rates, it is a condition precedent to the maintenance of the action under Section 16. The services before the Commission, therefore, constitute part of the services required for the successful maintenance of the action and may properly be taken into consideration in fixing the amount to be allowed for the services in the action.

IV. Even if no action has been brought under Section 16, the court would, at any time, have had the right to fix the at-

torney's fee for the services before the Commission ; and the mere fact that the application was not made until an action had been commenced did not deprive the Court of this power. Section 18 is explicit in providing that, "*in every case*" where damages are awarded by the Commission, the carrier shall be liable also for the attorney's fee, to be fixed by the court. Therefore, when, in the present case, the Commission made an award of damages to the complainant, the Railroad Company immediately became liable for an attorney's fee, to be fixed by the court.

It is not necessary that an action should be pending to give the court this power to fix the fee under Section 8. No action will be brought where the order of the Commission directing payment is complied with. In such case, the court which would have this power would undoubtedly be the court before which the action under Section 16 would be tried, if one were brought.

Re Account of the Dist. Atty., 23 Fed., 26 ;
United States v. Bashaw, 50 Fed., 749.

When the orders of the Commission were originally made in the cases at bar, the complainant might then have applied to the District Court, in the Eastern District of Pennsylvania, to have the attorney's fee, under Section 8, fixed. Therefore, in fixing the fees in the trial Court, the amount allowed for services before the Commission was properly awarded in pursuance of the power conferred by Section 8, and the amount allowed for services in the action was properly awarded in pursuance of the power conferred by Section 16.

Inasmuch as the attorney's fee given by Section 8 is payable only in the event of a recovery by the complainant, it obviously would be idle to ask the court to fix the amount under Section 8 before it was known whether the carrier would comply with the order for payment or would resist the order and force the complainant to bring an action, under Section 16. The complainant will, therefore, in all such cases, wait until the question of his recovery has been finally determined ; and if he is obliged to commence an action, he will wait until judgment has been rendered ; because, if the order of the Commission should be reversed,

he would not be entitled to an attorney's fee under Section 8, inasmuch as he would not have recovered anything. It is, therefore, good practice, under Section 8, to wait until it has been finally determined, either by compliance with the Commission's order on the part of the carrier, or by the judgment of the court in case the order is contested, that the recovery has become certain. But when that fact has been ascertained, the court may be asked to fix the fee under Section 8, at the same time that it fixes the fee under Section 16.

V. It makes no difference whether Section 16 was intended to include the fee for legal services rendered before the Commission or whether it is limited to services actually performed in the action. If the latter is the correct construction, there is nothing inconsistent in it with the provisions of Section 8 making the carrier liable for the legal services in the proceeding before the Commission. The only possible loophole of escape from this liability imposed by Section 8 must be based on the proposition that the provision under Section 16, authorizing a fee in the action, nullifies the provision in Section 8, making the carrier liable *in every case* of recovery for the fee in the proceeding before the Commission. It is a cardinal rule of construction, that effect must be given to every part of a statute, unless the repugnance of the later provision to the earlier one is so clear that the two cannot both stand. But there is not the slightest inconsistency between the two provisions in Sections 8 and 16, one of which is for services before the Commission and the other for services in the action.

VI. Sections 8 and 16 reveal clearly the legislative intent to throw the entire expense of an unsuccessful contest on the common carrier. The object of the Interstate Commerce Act was to protect the shipper against the arbitrary and unjust acts of the common carrier. This object could not be effectively accomplished unless it was practicable for the shipper to establish his grievances before the Commission.

But he could rarely do this, if the cost of the proceeding were thrown upon him.

Seaboard Air Line R. Co. v. Seegers, 207 U. S., 73, 77-8;
Riverside Mills v. Atlantic Coast Line R. Co., 168 Fed., 990, 992.

To make the Act efficient, therefore, it was essential that all the legal expenses connected with the proceeding should be paid by the carrier, in all cases where the carrier was found guilty of a violation of the Act.

VII. If the effect of the action, under Section 16, was to limit the power of the Court to the legal services rendered in that action and to nullify the power conferred upon the court by Section 8, then it would always be possible for the carrier to avoid the liability for the attorney's fee, imposed by Section 8. All that it would have to do would be to refuse to comply with the order of payment and force the shipper to bring an action. It is inconceivable that Congress intended to permit a carrier to so palpably evade this liability under Section 8, by the simple expedient of disregarding the order of the Commission and putting the shipper to further trouble, expense and delay in the enforcement of his right. No matter how glaring the violation of the statute had been by the carrier, no matter how costly the proceeding before the Commission, nor how certain that the order of the Commission would be enforced by the Court, the carrier could completely avoid all liability for the legal services before the Commission by disregarding the order and forcing the complainant to bring an action under Section 16. The Court will certainly not construe the statute in that way, and thus reward the guilty party and penalize the innocent and successful party. This would clearly be to disregard altogether the legislative intent.

FIFTEENTH.

This Court should direct the judgment that should have been entered by the Circuit Court of Appeals.

Delk v. St. Louis & San Francisco R. R., 220 U. S., 580, 589;

Baker v. Warner, 231 U. S., 588, 593 ;

Baer Bros. v. Denver & R. G. R. Cp., 233 U. S., 479, 490.

The judgment of the Circuit Court of Appeals, in each case, should, therefore, be reversed, and the judgment of the trial Court, in each case, should be affirmed in all respects.

Washington, October, 1914.

WILLIAM A. GLASGOW, JR.,

JOHN A. GARVER,

Counsel for Petitioner.

Office Supreme Court, U. S.

FILED

MAY 9 1914

JAMES D. MAHER
CLERK

Supreme Court of the United States.

October Term, 1913.

No. 1000. **434**

HENRY E. MEEKER, surviving partner, etc.,
Plaintiff-in-error,
against -
LEHIGH VALLEY RAILROAD COMPANY,
Defendant-in-Error.

No. 1001. **435**

HENRY E. MEEKER,
Plaintiff-in-error.
against
LEHIGH VALLEY RAILROAD COMPANY,
Defendant-in-Error.

PETITION TO ADVANCE.

Now comes Henry E. Meeker, the plaintiff-in-er-

ror in the above entitled causes, and respectfully pray
that this Honorable Court will advance the said cause
upon the docket of the Court and set the same for
argument at as early a date as may to the Court seem
advisable, and if agreeable to the Court at the head
of the docket for the October Term, 1914.

The matter involved is the construction of certain
provisions of the Act to Regulate Commerce. The rea-
sons for advancing these causes are the same as those
set forth in the petition and brief filed herein upon
application for writs of certiorari, which were de-
clared granted by this Court on April 13, 1914; and the plain-
tiffs-in-error respectfully refer the Court to the said
petition and its brief and the brief on behalf of the
Interstate Commerce Commission for a more detailed
statement of said reasons.

Respectfully submitted,

WILLIAM A. GLASGOW, JR.

JOHN A. GARVER,

Counsel for plaintiff-in-error

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U.S. Supreme Court, D.

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JAMES W. CLEARY
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1914.

No. 434.

HENRY E. MEEKER, Surviving Partner of the Firm
of Meeker & Company,

Petitioner.

vs.

LEHIGH VALLEY RAILROAD COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR LEHIGH VALLEY RAILROAD COMPANY, RESPONDENT.

EDGAR H. BOLES,
Solicitor for Respondent.

JOHN G. JOHNSON,
FRANK H. PLATT,
GEORGE W. FIELD,
Counsel.



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In the Supreme Court of the United States,

OCTOBER TERM, 1914.

HENRY E. MEEKER, surviving partner of the firm of Meeker & Company,

Petitioner,

vs.

LEHIGH VALLEY RAILROAD COMPANY,

Respondent.

No. 434.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT.

Statement.

This action is brought to recover \$107,465.58, with interest (R. 8). The amount covers two claims made by Meeker & Company as shippers of anthracite coal, one based on alleged discriminations and one based on alleged excessive rates. Between November 1, 1900, and July 1, 1907, Meeker & Company shipped anthracite coal from the Wyoming Region in Pennsylvania to tidewater at Perth Amboy, New Jersey, over the Lehigh Valley Railroad. They paid tariff rates.

Note—Although cases Nos. 434 and 435 will be argued together, we have thought it better for greater clearness to submit separate briefs.

Mr. Meeker, as surviving partner, now claims that between November 1, 1900, and August 1, 1901, if his firm had been allowed the rates which were allowed other shippers it would have saved \$11,009.33. His first claim is for this \$11,009.33, which, with interest to August 1, 1912, amounts to \$18,275.49 (R. 8). We shall refer to this first claim as the discrimination claim.

He also claims that between August 1, 1901, and July 1, 1907, his firm paid as freight charges \$685,375.27; that the charges were excessive; that reasonable charges for the service would not have exceeded \$627,138.82. He claims the difference, namely, \$58,236.45, as excessive charges. His second claim is for this \$58,236.45 which, with interest to August 1, 1912, amounts to \$89,190.09 (R. 8). We shall refer to this second claim as the excessive charge claim.

Action was commenced September 3, 1912, by filing of the Petition (R. 3). On October 5, 1912, defendant filed its Plea, denying the claims and pleading the bar of the Statutes of Limitations applicable to the claims (R. 49).

The case was tried before Judge Holland and jury November 11th and 12th, 1912 (R. 50). Verdict was rendered for the plaintiff for the full amount, with interest (R. 50, 99).

December 19, 1912, judgment was entered for \$109,280.17 (R. 100). The Court also ordered that plaintiff's counsel be allowed \$10,000 as a counsel fee for his services in a certain proceeding before the Interstate Commerce Commission; and the further sum of \$10,000 for services in this action (R. 99).

Thereupon defendant filed its bill of exceptions, assignments of error, and its petition for a writ of error (R. 50, 101, 102). Upon order the writ of error was issued December 30, 1912 (R. 101).

The case was reviewed by the Circuit Court of Appeals, which on August 27, 1913, handed down its opinion directing that the judgment be reversed with directions for a *venire de novo* (R. 150). The Appellate Court granted a rehearing and on February 19, 1914, filed its further opinion sustaining the assignments of error and holding that the judgment should be reversed and a *venire de novo* awarded (R. 161). Judgment of reversal was entered February 19, 1914 (R. 161).

Thereafter and on March 30, 1914, Mr. Meeker petitioned this Court for a writ of certiorari, citing the importance of the questions of law involved and the hardship to him if he must go back to the trial Court and thereafter bring the questions to this Court by writ of error after final judgment.

This Court granted the writ on April 29, 1914 (R. 162).

On May 8, 1914, the return was duly filed in this Court (R. 163).

Chronological Statement of Facts.

The Petitioner, Henry E. Meeker, is the surviving partner of Meeker & Company (R. 50). Meeker & Company were coal dealers who purchased anthracite coal in the Wyoming region of Pennsylvania and shipped it to tidewater at Perth Amboy, New Jersey (R. 51). They shipped their coal over the Lehigh Valley Railroad (R. 51).

July 17, 1907, Meeker & Company filed a complaint with the Interstate Commerce Commission against the Lehigh Valley Railroad Company (R. 59). In their complaint they asked the Commission to compel the railroad to reduce its rates on anthracite coal from the Wyoming region in Pennsylvania, to Perth Amboy, New Jersey. The rates then in effect (July 17, 1907), were

\$1.55 per gross ton of 2,240 pounds, on prepared sizes of coal (including egg, stove and chestnut), \$1.40 per gross ton on pea coal, \$1.20 per gross ton on buckwheat coal, and \$1.10 per gross ton on sizes of anthracite coal smaller than buckwheat coal (R. 73). Meeker & Company asked that all these rates be reduced to \$1 per ton.

But of greater importance to Meeker & Company than the question as to the rate for the future, was an enormous claim for reparation, based on shipments made from time to time, during the preceding seven years.

In said petition, which they filed with the Commission July 17, 1907, Meeker & Company, in addition to asking that the rates be reduced to \$1.00 per ton, demanded reparation from the railroad on account of the shipments they had made between November 1, 1900, and July 17, 1907. They made two distinct claims for reparation—one based upon an alleged discrimination, and the other based upon alleged excessive charges. The discrimination claim covered the period from November 1, 1900, to August 1, 1901. The excessive charge claim covered the period from August 1, 1901, to July 1, 1907. The first or discrimination claim was based on the contention that from November 1, 1900, to August 1, 1901, Meeker & Company paid rates higher than those paid by other shippers. Meeker & Company made various shipments between November 1, 1900, and August 1, 1901, and paid the railroad as freight charges \$129,989.18 (R. 57). They claimed that other shippers were allowed rates, which if applied to their shipments, would have reduced their payments to \$118,979.85, a difference of \$11,009.33, which they claimed as damages.

The second or excessive charge claim was based on their contention that the tariff rates were too high. They claimed that between August 1, 1901, and July 1, 1907,

they had made various shipments from the Wyoming region to Perth Amboy, and had paid at tariff rates \$685,375.27. They claimed as reparation the difference between this amount and what the charges would have amounted to at the rate of \$1 per ton.

The statement in petitioner's brief that the hearings before the Commission occupied about four years is not correct. Counsel refers to page 88 of the record, where he himself stated "That the Commission, after a year and a half of consideration or two years' consideration, found that the rates were unreasonable." The Court then stated "They (the Commissioners) had it before them from 1907 to 1911," to which counsel answered "Exactly, they had it for four years." As a matter of fact, although complaint was filed in 1907, hearings were not commenced until March 23, 1909, and there were in all less than twenty-five hearings.

June 8, 1911, the Commission filed its opinion, at the conclusion of which it stated: "We are of opinion and so find that defendant's rates for the transportation of coal from the Wyoming region to Perth Amboy of \$1.55 per gross ton on prepared sizes, \$1.40 on pea coal, and \$1.20 on buckwheat coal, are unreasonable so far as they exceed \$1.40 on prepared sizes, \$1.30 on pea coal, and \$1.15 on buckwheat" (R. 47).

In addition to this finding to the effect that the present rates (as of June 8, 1911, the date of the opinion) were excessive, the Commission stated, as to Meeker & Company's first, or discrimination claim: "We are of the opinion and so hold that complainants have sustained the allegation of unjust discrimination under the second section of the act. Reparation, with interest from August 1, 1901, will be awarded on this account" (R. 23).

Meeker & Company's second, or excessive charge claim, was referred to in the opinion of June 8, 1911, as follows: "We are further of opinion that reparation should be awarded upon basis of the rates herein found to be reasonable upon all shipments of coal by complainants from the Wyoming region to Perth Amboy since August 1, 1901. The amount of reparation which should be awarded under our finding in this case can not be ascertained from the exhibits now on file, and such further proceeding will be had as may be necessary to determine the amount of money due to complainants" (R. 47).

On the same day (June 8, 1911) the Commission made its order requiring that the rates be reduced, and that for a period of two years thereafter such reduced rates should be the maximum to be charged (R. 48). This order (of June 8, 1911) contains no provision as to reparation.

May 7, 1912, the Commission filed a supplemental report, in which it stated:

"On basis of our conclusions in the former report, and upon consideration of the evidence adduced at the hearing upon the question of reparation, we now find that during the period from November 1, 1900, to August 1, 1901, complainant shipped from the Wyoming coal region of Pennsylvania to Perth Amboy, N. J., 55,257.75 tons of coal of prepared sizes, 16,689.76 tons of pea coal, 11,448.93 tons of buckwheat coal, and 4,926.77 tons of rice coal, and paid charges thereon, amounting to \$129,-989.18, at the rates found to have been unjustly discriminatory; that the complainant has been damaged to the extent of the difference between the amount which he did pay and \$118,979.85, the amount which he would have paid had he been given the benefit of the rates ap-

plied by defendant to similar shipments of the Lehigh Valley Coal Company; and that he is, therefore, entitled to an award of reparation in the sum of \$11,009.33, with interest thereon from August 1, 1901. We find further that from August 1, 1901, to July 17, 1907, complainant shipped from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., 246,870.15 tons of coal of prepared sizes, 106,051.09 tons of pea coal and 87,250 tons of buckwheat coal, and paid charges thereon amounting to \$685,375.27, at the rates found to have been unreasonable; that complainant has been damaged to the extent of the difference between the amount which he did pay and \$626,945.62, the amount which he would have paid at the rates found reasonable, less \$193.20 deducted by stipulation of all parties on account of certain claims already paid; and that he is, therefore, entitled to an additional award of reparation in the sum of \$58,236.45, with interest, amounting to \$27,750.64, on the individual charges comprising said sum from the dates of payment thereof to September 1, 1911, together with interest on said sum of \$58,236.45 from September 1, 1911" (R. 11).

On the same day (May 7, 1912) the Commission made a supplemental order in which it stated:

"It is ordered, That defendant, Lehigh Valley Railroad Company, be, and it is hereby authorized and required to pay unto complainant, Henry E. Meeker, on or before the 15th day of July, 1912, the sum of \$11,009.33, with interest thereon at the rate of 6 per cent per annum from the 1st day of August, 1901, as reparation for unjustly discriminatory rates charged for the transportation of anthracite coal from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., which rates so charged have been found by this Commission to have

been unjustly discriminatory, as more fully and at large appears in and by said report of the Commission.

"It is further ordered, That defendant, Lehigh Valley Railroad Company, be, and it is hereby authorized and required to pay unto complainant, Henry E. Meeker, on or before the 15th day of July, 1912, the sum of \$58,236.45, with interest thereon at the rate of 6 per cent per annum, amounting to \$27,750.64, upon the various individual charges comprising said sum, from the dates of payment thereof to September 1, 1911, as itemized in Complainant's Exhibit 2, together with interest at the rate of 6 per cent per annum on said sum of \$58,236.45 from September 1, 1911, as reparation for unreasonable rates charged for the transportation of various shipments of anthracite coal from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., which rates so charged have been found by this Commission to have been unreasonable, as more fully and at large appears in and by said report of the Commission" (R. 13).

In making the supplemental order (R. 13) the Commission sought to comply with section 16 of the Act to Regulate Commerce, which provides: "That if, after hearing on a complaint made as provided in section 13 of this Act, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this Act, for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named."

Section 16 of the Act continues as follows: "If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the Circuit Court of the United

States for the district in which he resides, or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, a petition setting forth briefly the cause for which he claims damages, and the order of the Commission in the premises. Such suit shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated * * *." (There is a further provision as to costs and attorney's fees, and a provision that "A petition for the enforcement of an order for the payment of money shall be filed in the Circuit Court * * * within one year from the date of the order and not after.")

The reparation order was served upon the defendant railroad (R. 72); and the railroad did not comply with such order for the payment of money within the time limit of the order.

Thereupon Mr. Meeker, as surviving partner of Meeker & Company, brought this action in the District Court.

The Pleadings.

The action was commenced by the filing of a petition on September 3, 1912 (R. 3). This petition makes claim for the amounts awarded by the Commission in its order, which the railroad has refused to pay. Attached to the petition as exhibits are the Commission's report of June 8, 1911, and the order as to future rates handed down at the same time (R. 16, 48); also the supplemental or reparation report (R. 10); and the supplemental or reparation order (R. 13).

The petition alleges two groups of causes of action. The causes of action in the first group are based on the

alleged discriminations from November 1, 1900, to August 1, 1901. The causes of action in the second group are based on the alleged excessive freight charges from August 1, 1901, to July 1, 1907.

As to the first group of causes of action, the petitioner alleges that from November 1, 1900, to August 1, 1901, the railroad charged Meeker & Company higher rates than it charged the Lehigh Valley Coal Company, on shipments of the same commodity; and that if the rates which he alleges were given to the Lehigh Valley Coal Company during the period were applied to Meeker & Company's shipments, Meeker & Company would have saved \$11,009.33 (R. 6).

As to the second group of causes of action, petitioner alleges that from August 1, 1901, to July 1, 1907, Meeker & Company paid as freight, at tariff rates, \$685,-375.27; that said tariff rates were excessive in so far as they exceeded \$1.40 per ton for prepared sizes, \$1.30 per ton for pea coal, and \$1.15 per ton for buckwheat coal (these last mentioned rates are the rates which the Commission, in its opinion dated June 8, 1911, found to be reasonable as of that date, June 8, 1911); that if these last mentioned rates had been charged between August 1, 1901, and July 1, 1907, instead of the tariff rates actually charged, Meeker & Company would have saved \$58,236.45 and interest (R. 6).

Petitioner demands judgment in this action for \$107,-465.58, with interest from August 1, 1912 (R. 8). This amount includes the discrimination claim of \$11,009.33, which with interest to August 1, 1912, equals \$18,275.49; and also the excessive charge claim of \$58,236.45, which with interest to August 1, 1912, equals \$89,190.09 (R. 8).

Defendant's plea, filed October 5, 1912, is as follows: "The defendant, the Lehigh Valley Railroad Company,

for a plea in the above stated case, pleads Not Guilty; and further pleads the bar of the Statute of Limitations applicable to the plaintiff's claim; and for further plea in this behalf defendant avers that the Interstate Commerce Commission has no jurisdiction to make the findings and order of reparation which the plaintiff seeks to enforce by this proceeding, and further that there was before the Commission no substantial evidence to sustain said findings and said order" (R. 49).

The Trial.

At the trial the plaintiff put in evidence the opinion of the Commission dated June 8, 1911, and the order fixing the rates for the future (said opinion and order are offered at page 59, received over objection at page 67, and printed at pages 16 and 48); also the supplemental or reparation report and order, dated May 7, 1912 (said report and order are offered at page 67 of the record, received over objection at page 72, and printed at pages 10 and 14).

As to the first group of causes of action, which we shall refer to as the discrimination claim, and which covers the period from November 1, 1900, to August 1, 1901, the plaintiff introduced no evidence, other than the Commission's opinions and orders, showing or tending to show the existence of the alleged discrimination, or that Meeker & Company were in any way damaged.

As to the second group of causes of action, which we shall refer to as the excessive charge claim, and which covered the period from August 1, 1901, to July 1, 1907, the plaintiff introduced no evidence other than the opinions and orders of the Commission, showing or tending to show that the rates paid were excessive, or that lower rates would have been reasonable or compensatory, or that Meeker & Company were in any way damaged.

At the close of the case, no motion was made by plaintiff for a direction of a verdict or for binding instructions (R. 92). The defendant submitted its points for charge which were argued and refused (R. 94-99). Exceptions were taken by defendant to the admission of plaintiff's proof, to the charge of the Court, and to the refusal of defendant's points to charge. The grounds of the exceptions are repeated in the assignments of error (R. 102).

(We shall call attention to the exceptions and assignments of error in connection with the points to which they apply.)

Respondent's Points.

The questions of law raised upon this writ will be discussed under the following heads:

FIRST: Plaintiff has failed to prove by competent evidence that the Railroad violated the Commerce Act. Plaintiff relied for his proof, upon the reports and orders of the Commission. These do not prove that Meeker and Company were discriminated against, and do not prove that unlawful rates were charged.

SECOND: Plaintiff has failed to prove by competent evidence that Meeker & Company sustained damage. The measure of damage, if any, should be the loss to Meeker & Company as the result of the alleged discrimination or the alleged unreasonable rate. It does not follow from the conclusion of the Commission that an established rate is unreasonable in so far as it exceeds a stated amount, that a shipper who paid the established rate has been damaged, or that his damage, if any, should be measured by the difference between the two amounts.

THIRD: The Commission's opinions contain statements, arguments and conclusions which the Act does not purport to make admissible as *prima facie* evidence in a suit for damages. In admitting the reports in evidence the trial Court prejudiced the rights of the defendant, making it thereafter impossible for the defendant to place before the jury its side of the case unembarrassed by the incompetent and misleading statements in the opinions.

FOURTH: Section 16 of the Commerce Act is unconstitutional in so far as it deprives the defendant in a damage suit of a fair trial by jury.

FIFTH: The complaint of Meeker & Company before the Commission was filed July 17, 1907, at a time when the right of the Commission to pass upon the greater part of said claims had expired by limitation.

SIXTH: This action was commenced on September 3, 1912, at a time when the plaintiff was barred by limitation from bringing an action upon any of his claims.

SEVENTH: The allowances for counsel fees are invalid and excessive.

FIRST POINT.

Plaintiff has failed to prove by competent evidence that the Railroad violated the Commerce Act. Plaintiff relied for his proof, upon the reports and orders of the Commission. These do not prove that Meeker and Company were discriminated against, and do not prove that unlawful rates were charged.

The opinions and orders of the Commission were received in evidence, over defendant's objection that they contained no facts and no findings of fact, as required by statute, and contained no facts upon which an award for reparation could be based (R. 63, 68, 70). The defendant requested the Court to direct a verdict for defendant upon the ground that the findings and orders of the Commission contained no facts or findings of fact to support an award of reparation (R. 95). The Court denied the request, and exception was taken. The Court instructed the jury: "It is objected here, that these reports made by the Commission upon which this suit is based, are not in accordance with the requirements of this Act, and that therefore you should find for the defendant. But I instruct you that they are, in the judgment of the Court, in accordance with the requirements of this section. They state the conclusions as required by the Act and they state the findings of fact upon which the award is based, and they make that award in the sums that I have mentioned, upon sufficient findings of fact to sustain this suit" (R. 90). To these charges the defendant excepted (R. 93). The rulings are assigned as error (Nos. 1-18, 24, 26-32, R. 102-104, 106-108).

(a) *As to the Discrimination Claim (November 1, 1900, to August 1, 1901):*

The first part of the opinion of June 7, 1911, contains a discussion of the discrimination charge (R. 16-23). In conclusion the Commission states: "We are of the opinion, and so hold, that complainants have sustained the allegation of unjust discrimination under the second section of the Act. Reparation with interest from August 1, 1901, will be awarded on this account." As stated in the opinion, this conclusion is based upon the following circumstances:

The railroad owns all the capital stock of the Lehigh Valley Coal Company (R. 18). The Coal Company owns coal mines. It mined coal which it shipped to markets, including the tidewater market at Perth Amboy. The Coal Company also purchased coal which it shipped to markets. The coal so mined or purchased was shipped over the lines of the Railroad (R. 19).

Prior to 1900 the Coal Company purchased coal at sixty per cent of the tidewater price (R. 19). August 1, 1901, the price was raised from sixty per cent to sixty-five per cent of the tidewater price (R. 20). The change was made retroactive to November 1, 1900. Those who sold coal to the Coal Company from November 1, 1900, to August 1, 1901, for sixty per cent received an additional five per cent, making the purchase price from and after November 1, 1900, sixty-five per cent of the tidewater price (R. 20).

The coal was purchased at the mines. The Coal Company took title at the mines and was the shipper of the coal. There is nothing to show that any of the coal purchased by the Lehigh Valley Coal Company was ever shipped to Perth Amboy. If it was shipped to Perth Amboy the Coal Company paid the same rates as did Meeker & Company (R. 21).

In 1900 a prolonged strike reduced the Coal Company's stock of stored coal. In 1901 this stock was re-stored. Over one million dollars worth of coal was stored during the year ended November 1, 1901 (R. 22). During the same year the Coal Company borrowed \$1,000,000 from the Railroad.

Prior to November 1, 1900, Meeker & Company, and all other shippers, including the Coal Company, paid for transportation to Perth Amboy a rate equal to forty per cent of the tidewater price (R. 19). If the tidewater price was \$4.00, those who shipped to tidewater paid forty per cent or \$1.60 for freight. Meeker & Company bought coal at the mines and shipped it to Perth Amboy, paying prior to November 1, 1900, forty per cent of the tidewater price (R. 19).

It is stated that Meeker & Company expected, when the price paid by the Coal Company to operators was raised from sixty per cent to sixty-five per cent, that the freight rate would be reduced from forty per cent to thirty-five per cent. In fact, Mr. Meeker claims that he had an understanding with the Railroad Company whereby such a change in the rate would be made (R. 20). If there had been such an arrangement, it could not be enforced in this action. Mr. Meeker having chosen to proceed before the Commission, is limited to proof of damage resulting from discrimination against him and in favor of other shippers.

But the Railroad Company did not reduce its rates from forty to thirty-five per cent. As of August 1, 1901, it discontinued the percentage freight rate and charged the tariff rates (R. 23). In the meantime, and between November 1, 1900, and August 1, 1901, a complication had arisen from the fact that the price at tidewater became so high that at times forty per cent of the tidewater price exceeded the tariff rates (R. 20).

This was settled by returning to shippers all amounts paid in excess of tariff rates (R. 21). The rates to all shippers, including Meeker & Company, were forty per cent of the tidewater price down to August 1, 1901, with the exception that when the forty per cent exceeded the tariff rate the tariff rate was the maximum. Down to August 1, 1901, the Lehigh Valley Coal Company, and all other shippers, paid as freight forty per cent of the tidewater rate, except where the forty per cent exceeded the tariff rate, in which case the tariff rate was paid (R. 21). Where the forty per cent exceeded the tariff rate, shippers who had paid any excess over the tariff rates were refunded the excess, with the exception of Meeker & Company, to whom such excess was proffered. Meeker & Company, however, refused to accept a refund, claiming that they were entitled to a freight rate of thirty-five per cent (R. 21).

The Commission could not enforce the alleged understanding between Meeker & Company and the Railroad. It arrived at the same result, however, by the following process: It assumed that an operator who sold to the Coal Company at the mines, at sixty per cent of the tidewater price, was to all intents and purposes a shipper to tidewater at a freight rate of forty per cent (R. 19); that when the Coal Company raised its price from sixty per cent to sixty-five per cent, the Railroad was bound, as a matter of law, to reduce the freight rate from forty per cent to thirty-five per cent.

The fallacy is apparent. It might well be that all coal purchased was shipped to Buffalo. The fact that the price was controlled by the market price at tidewater did not indicate that the coal ever reached the tidewater market. Again, the Commission admits that those who shipped to tidewater did so because it was more profitable than selling to the Coal Company at the mines (R.

19). The Commission did not find a discrimination in favor of the Coal Company, it found an alleged discrimination in favor of operators who sold their coal at the mines and who did not ship a ton of coal, whose coal in fact may never have reached the tidewater market (R. 23). The Commission's conclusion is based on the fiction that these operators were shippers.

In his petition, and in his brief in this Court, petitioner alleges that the discrimination was in favor of the Coal Company (R. 5). To prove this, he relies on the conclusion of the Commission as to a discrimination in favor of operators who sold their coal to the Lehigh Valley Coal Company. The Commission found that the Coal Company paid the same rates as did Meeker & Company (R. 19, 21).

The Commission has not found, as stated at pages 25 and 26 of petitioner's brief, that on August 1, 1901, the rate was fixed at thirty-five per cent, and that the railroad company returned to all shippers except Meeker & Company the five per cent difference. The report expressly finds that all shippers were paid back the excess which they had paid over the tariff rate. The five per cent was paid back, not to shippers, but to those who had sold all their coal to the Lehigh Valley Coal Company at the mines. There was no such thing as a thirty-five per cent rate. The finding of the Commission is that the Lehigh Valley Coal Company, Meeker & Company and all other shippers paid the same rate, except that Meeker & Company were offered refunds for excesses over tariff rates and refused to accept them. The only grievance that Mr. Meeker had was, as stated, the fact that the Railroad did not keep its alleged agreement to reduce the rates upon the percentage basis. Mr. Meeker claims that there was such a percentage agreement and the railroad refused to keep it. There is no claim, however, that the

Railroad Company did readjust any rates on the percentage basis. The only percentage readjustments were readjustments made with miners who sold their coal at the mines and who were not and could not be shippers, whose coal in fact might never have come to tidewater. The entire subject of discrimination is illogically confused by the false assumption that a coal operator selling all his coal at the mines is a shipper. On the one hand it is charged, merely as a conclusion of law, that these operators were shippers and that the amounts returned to them by the Coal Company were in fact returned by the Lehigh Valley Railroad Company. On the other hand it is loosely asserted that rebates were paid to the Lehigh Valley Coal Company, which never received a rebate and which, as the Commission finds, paid the same rate as all other shippers. The statement carelessly made in the supplemental report and repeatedly urged in petitioner's brief, to the effect that the Lehigh Valley Coal Company received a rebate is not supported by and is entirely contrary to the statements contained in the original report, which report was drawn up on the erroneous theory that the operators who did not ship their coal but sold it at the mines were shippers. Such statements as those found at page 26 of petitioner's brief as: "The railroad returned to all shippers except Meeker & Company the 5% difference;" and again "When the Railroad Company subsequently reduced the rate to every one except Meeker & Company;" are not based upon any evidence in the case and are not true in fact.

It is apparent, therefore, on the face of the report, that the conclusion as to discrimination was based on a mistake of law, and for this reason it has no binding effect in this suit.

Interstate Com. Com. v. Union Pac., 222 U. S.

541.

Atchison T. & S. F. v. I. C. C., 188 Fed. 229.

*Interstate Com. Com. v. Louisville & Nash.
R. R.*, 227 U. S. 88, at 92.

Furthermore, Meeker & Company could have sustained no damage on account of the alleged discrimination. It could make no difference to them whether the Coal Company paid operators \$2.40 or \$2.60. Those operators, who sold at the mines to the Coal Company, were not competitors with Meeker & Company in the tidewater market. Mr. Meeker is not complaining that he was not treated the same as the operators. He now claims he was not treated the same as the Coal Company. There is no evidence and not even a conclusion to support such claim.

As stated in the report of the Commission, Mr. Meeker's claim before the Commission was: "That the payment of the increased retroactive prices to the coal producers by the Lehigh Valley Coal Company was in fact a payment by the Lehigh Valley Railroad Company and therefore equivalent to a readjustment by the latter company of its freight rates upon the basis of the sixty-five per cent contracts on such coal as was shipped by the Lehigh Valley Coal Company during the period from November 1, 1900, to August 1, 1901" (R. 21). After discussing this contention, the Commission concluded "From the facts disclosed it is apparent that the payment of the \$231,090.19, which was ostensibly made by the Lehigh Valley Coal Company to the coal operators from which it had purchased coal during the period from November 1, 1900, to August 1, 1901, was in fact made from funds advanced as cash by the Lehigh Valley Railroad Company to the Lehigh Valley Coal Company

and was therefore the equivalent of a readjustment of the freight rates upon the basis of the sixty-five per cent contract on such coal as was purchased by the Lehigh Valley Coal Company and shipped to tidewater during the period from November 1, 1900, to August 1, 1901" (R. 23). There is no suggestion that the Lehigh Valley Coal Company received or benefited by any concession from the freight rate. There was no dispute as to the facts and no attempt to obtain from the Commission a finding that the Lehigh Valley Coal Company had received any concession or had been benefited. The issue was as to whether or not the additional payments by the Coal Company to the operators were in substance a payment by the railroad to the operators as shippers.

(b) *As to the claim based upon the alleged excessive freight charges (August 1, 1901, to July 1, 1907):*

For proof of this claim, plaintiff relies upon the opinions and orders of the Commission.

Section 16 of the Act to Regulate Commerce provides: "On the trial of such suit the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated."

Section 14 provides: "That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises, and in case damages are awarded, such report shall include the findings of fact on which the award is made."

Prior to the Hepburn amendment of June 29, 1906, the requirement was, that in all cases the report should include the findings of fact on which the conclusion of the Commission is based (Sec. 14 as amended by Act of March 2, 1889). It is significant that in amending the

section Congress retained the requirement that in reparation cases the reports shall include the findings of fact on which the award is made. A good illustration of what Congress had in mind is included in the opinion in the case of *Southern Railway Co. v. St. Louis Hay & Grain Company* (153 Fed. 728), wherein the findings of the Commission are quoted at some length. In the Meeker opinion the Commission has not pretended to meet the requirements of Section 14, above quoted (R. 23-46). The opinion is for the most part a statement of what the complainant proved, what the defendant proved, what the complainant's counsel said about the defendant's testimony, and what the defendant's counsel said about the complainant's testimony. The discussion sufficiently reveals the fact that many issues of fact were raised by the evidence before the Commission. The Commission has made no finding upon many of them. Even where the Commission has accidentally stated a fact, it has made such statement valueless by failing to find or state other necessary facts. To illustrate: Certain comparisons were made with rates on other railroads. To make such comparisons of any use, it was necessary to find that the conditions were substantially similar. No such finding was made. Again, reference is made to proof of investment value and annual return thereon. The Commission did not find the investment value, nor did it find the return. It begged the question by pointing out that the shareholders were earning a liberal return upon the par value of their capital stock (R. 45).

But plaintiff's counsel contended before the trial Court that the Commission found the rates excessive in so far as they exceeded \$1.40 for prepared sizes, \$1.30 for pea coal, and \$1.15 for buckwheat coal; that such finding is a "fact" within the meaning of Section 16; and that to prove his case, it was only necessary to show that the

Commission made this so-called finding, and to multiply the excess by the number of tons shipped. The learned trial Judge concurred in this and on that theory instructed the jury (R. 91).

The Commission did not conclude or find, that as to the period between August 1, 1901, and July 1, 1907, the tariff rates paid by Meeker & Company were excessive or that lower rates would have been reasonable or compensatory.

The rates paid were the tariff rates, and in the absence of a finding by the Commission to the contrary, they are the only lawful rates (*Abilene Cotton Oil case*, 204 U. S. 426). The Commission has repeatedly held that it will not grant reparation unless it can affirm with confidence that the rate charged in the past was unreasonable when paid; and that the fact that a rate is unreasonable at present raises no presumption that it was unreasonable in the past (*Farmers Warehouse Co. v. L. & N. R. R. Co.*, XII, I. C. R. 457).

Therefore, the plaintiff to recover must prove that the rates charged were excessive, and that the lower rates would have been reasonable and compensatory. The Commission has made no such finding. At the conclusion of the opinion of June 8, 1911, the Commission states: "We are of opinion and so find, that defendant's rates for the transportation of coal from the Wyoming region to Perth Amboy, * * * are unreasonable so far as they exceed \$1.40 on prepared sizes, \$1.30 on pea coal, and \$1.15 on buckwheat." As to past rates, the Commission states: "We are further of opinion that reparation should be awarded upon basis of the rates herein found to be reasonable upon all shipments of coal by complainants from the Wyoming region to Perth Amboy since August 1, 1901. The amount of reparation which

should be awarded under our finding in this case cannot be ascertained from the exhibits now on file, and such further proceeding will be had as may be necessary to determine the amount of money due to complainants" (R. 47). This is not a finding to the effect that from August 1, 1901, to July 1, 1907, the tariff rates were excessive and the lower rates reasonable and compensatory.

The opinion of June 8, 1911, did not purport to be a report in a reparation case. The report did not award damages. Naturally, therefore, it did not contain the findings of fact on which an award could be made. Such were left for the future or reparation report. This report was issued nearly a year later, on May 7, 1912. In it the Commission states: "In our original report we found * * * that the rates in effect from August 1, 1901, to July 17, 1907, were unreasonable to the extent that they exceeded rates of \$1.40 per gross ton on prepared sizes, \$1.30 on pea and \$1.15 on buckwheat" (R. 11). The original report contained no such finding. The defendant objected to the admission of the supplemental report on the ground that it contained this misstatement of fact, the original report being the best evidence of the findings therein contained (R. 68). It is clear that the supplemental report was written under a serious misapprehension as to the meaning and effect of the original opinion. (Another illustration of this is the statement in the supplemental report to the effect that the Commission found in the original report that the Railroad charged Meeker & Company, from November, 1900, to August 1, 1901, rates which were discriminatory because they exceeded the rates charged the Lehigh Valley Coal Company (R. 11), the Commission having clearly stated in its original opinion that

the rates charged the Lehigh Valley Coal Company were the same as those charged Meeker & Company) (R. 21).

In the reports and orders in evidence there is no finding as to the reasonableness of rates during that period (1901-1907). There is only the inference arising from the fact that the Commission awarded the reparation.

A reparation report is not effective unless it contains findings of the facts on which the award is based. Such is the requirement of Section 14. In view of the requirements of Section 14, can it be contended that findings of fact, although omitted from the report, are to be inferred from the mere fact that an award is made?

As stated by the Commerce Court: "The plain question presented in every application for reparation is whether the rate which has been charged is reasonable or unreasonable; and, if unreasonable, the extent to which it is so. On this both the shipper and the carrier are entitled to an explicit finding; this, if found in favor of the shipper; being the foundation of his cause of action. Texas & Pacific R. R. v. Abilene Cotton Oil Co., 204 U. S., 437." *Russe & Burgess v. I. C. C.* (Commerce Court, 1912), 193 Fed. 678, at 680.

If it should be held that the Commission has found that the rates charged between August 1, 1901, and July 1, 1907, were excessive, and that the lower rates were reasonable and compensatory, such conclusions are not admissible in evidence as facts within the meaning of Section 16 of the Act.

Section 16 provides "That on the trial of such suit the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated." This section must be read in connection with Section 14, which

requires that the reports contain "the findings of fact on which the award is made."

Section 14 of the Act of 1887, as amended by the Act of March 2, 1889, read:

"That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto which shall [include the findings of fact upon which the conclusions of the Commission are based, together with its recommendation as to what reparation, if any, should be made by the common carrier to any party or parties who may be found to have been injured; and such findings so made shall thereafter, in all judicial proceedings, be deemed *prima facie* evidence as to each and every fact found]."

By the Act of 1906 the part in brackets was stricken out and in place thereof the following was inserted:

"state the conclusions of the Commission, together with its decision, order or requirement in the premises; and in case damages are awarded such report shall include the findings of fact on which the award is made."

Section 16 of the Act of 1887 said:

"The findings of fact of said Commission as set forth in its report shall be *prima facie* evidence of the matters therein stated."

This was changed by the Act of 1906 to read:

"The findings and order of the Commission shall be *prima facie* evidence of the facts therein stated."

Prior to 1906 a rule of the Commission read as follows:

"XIII. Upon the final submission of the case to the Commission, either party may submit proposed findings of fact for the consideration of the Commission, which findings must embrace only the material facts of the case supposed to be established by the testimony."

The Commission's opinion discloses that there were a large number of material facts upon which voluminous testimony was given. The fact that the period embraced covers many years, made necessary the settling of many material facts in the case. Under the permission of sections 14 and 16, it was possible for the complainant to submit proposed findings and to obtain from the Commission a statement of all the material facts established by the testimony. Such facts might or might not have warranted a jury in reaching the conclusion stated by the Commission. On the other hand, the mere statement that the Commission is of the opinion and so finds, that certain rates are unreasonable is proof only that the Commission found the rates unreasonable. The general statement of the Commission as to its opinion upon innumerable freight charges covering long periods of time, has been placed before the jury as conclusive of defendant's guilt, in the absence of controlling evidence to the contrary. The same misapprehension as to the meaning of Section 16, led the Trial Court to admit the Commission's conclusions as to damages, as well as the conclusions as to discrimination and unreasonableness. The Trial Court assumed all the conclusions to be binding on the jury in the absence of controlling evidence to the contrary. The error in each instance was the same, namely, a failure to distinguish between facts stated, and conclusions, or between the awards and the facts on which the award was made. The error is discussed at length under the Second Point of this brief which relates to the question of damages, and will not be repeated here.

If, however, it should be held proper that the jury pass upon the issues as to reasonableness, we submit that, for the reasons stated above and more fully discussed under the Second Point, such issues have not been properly proved or submitted to the jury in this case.

SECOND POINT.

Plaintiff has failed to prove by competent evidence that Meeker & Company sustained damage. The measure of damages, if any, should be the loss to Meeker & Company as the result of the alleged discrimination or the alleged unreasonable rate. It does not follow from the conclusion of the Commission that an established rate is unreasonable in so far as it exceeds a stated amount, that a shipper who paid the established rate has been damaged, or that his damage, if any, should be measured by the difference between the two amounts.

Defendant excepted to the Court's charge to the effect that the Commission had found Meeker & Company damaged (R. 92). Also to the charge that the reports stated sufficient evidence to sustain recovery (R. 93). The defendant asked the Court to charge that there was no evidence that Meeker & Company was damaged (R. 96). Due exceptions were taken and the respective rulings of the Court were assigned as error (R. 107). Since counsel for petitioner has said in his brief (pages 50 and 51) that this point was not raised below, we call especial attention to defendant's request to charge that "There is no evidence showing or tending to show that the petitioner was in any way damaged, or could have been damaged by the alleged acts of discrimination * * *" (R. 96). And again "There is no competent evidence either by way of findings or statements or any other evidence in this case that the petitioner was in any way damaged by the alleged imposition of unreasonable rates * * *" (R. 96). The same points are raised by assignments of error (R. 107).

The decision of the Supreme Court in *Pennsylvania R. R. v. International Coal Company*, 230 U. S., 184, is controlling. The International Coal Mining Company sued the Pennsylvania Railroad Company for damages based on an alleged violation of Section 2 of the Interstate Commerce Act. It was charged that the railroad paid other coal shippers rebates of from five to thirty-five cents per ton. The facts are concisely stated in the opinion at page 195, as follows: "On that date (April 1, 1899) the carrier increased the rates and discontinued the payment of rebates, except that for the purpose of saving shippers against loss, it made a difference between what is called 'free coal' and 'contract coal.' Under this practice where coal had been sold for future delivery, the carrier collected the published tariff rate, but rebated the difference between it and the lower rate in force when the contract of sale had been made. When, after April 1, 1899, the plaintiff applied for allowances, its demand was rejected, with the statement that all its contract coal would be protected in the same manner as others in the Clearfield District. The International Coal Company had no overlapping or unfulfilled contracts and claiming that it did not learn of the practice to protect such contracts until, in 1904, it brought this suit. It proved that between April 1, 1899, and April 1, 1901, it had shipped about 40,000 tons on which it had paid the full tariff rate, while other companies shipping from and to the same places at the same time had been allowed on their contract coal rebates of 5, 10, 15, 25 or 35 cents per ton. Plaintiff recovered a verdict."⁷

The judgment was reversed and a new trial granted on the ground that plaintiff had failed to prove that he had suffered pecuniary loss as a result of the discrimination.

The following extracts from the opinion are directly applicable to the present case:

"There were many provisions in the statute for imprisonment and fines. On the civil side the Act provided for compensation—not punishment. Though the Act has been held to be in many respects highly penal, yet there was no fixed measure of damage in favor of the plaintiff. But, as said in *Parsons v. Chicago & N. W. Railway*, 167 U. S., 447, 460, construing this section (8): 'before any party can recover under the Act he must show not merely the wrong of the carrier, but that that wrong has in fact operated to his injury.' Congress had not then and has not since given any indication of an intent that persons not injured might, nevertheless, recover what though called damages would really be a penalty, in addition to the penalty payable to the Government" (p. 200). * * * "For if the plaintiff here had been required to pay more than the tariff rate it could have recovered the excess, not as damages, but as overcharge, and while one count of the complaint asserted a claim of this nature, the proof did not justify a verdict thereon, for the plaintiff admitted that it had only paid the lawful rates named in the tariff. Of course, no part of such payment of lawful rates can be treated as an overcharge or as an extortion" (p. 202). * * * "The measure of damages was the pecuniary loss inflicted on the plaintiff as the result of the rebate paid. Those damages might be the same as the rebate, or less than the rebate, or many times greater than the rebate; but unless they were proved they could not be recovered. Whatever they were they could be recovered, because Sec. 8 expressly declares that wherever the carrier did an act prohibited or failed to do an act required, it should be '*liable to the person injured thereby for the full amount of damages sustained in conse-*

quence of such violation * * * together with reasonable attorney's fees" (p. 203). * * * "There was no proof of injury—no proof of decrease in business, loss of profits, expense incurred or damage of any sort suffered—the plaintiff claiming that, as matter of law, the damages should be assessed to it on the basis of giving to it the same rate, on all its tonnage, that had been allowed on any contract coal shipped, on the same dates, whether such tonnage was great or small" (p. 203). * * * "The statute gives a right of action for *damages* to the *injured* party, and by the use of these legal terms clearly indicated that the damages recoverable were those known to the law and intended as compensation for the injury sustained. It is elementary that in a suit at law both the fact and the amount of the damage must be proved." * * * "But the plaintiff may have sold at the usual profit all or a part of its 40,000 tons at the regular market price, the purchaser, on his own account, paying freight to the point of delivery. In that event not the shipper but the purchaser, who paid the freight, would have been the person injured, if any damage resulted from giving rebates. To say that seller and buyer, shipper and consignee, could both recover would mean that damages had been awarded to two where only one had suffered" (p. 204). * * * "The limitation of liability to the persons damaged and to an amount equal to the injury suffered is not out of consideration for the carrier who has violated the statute. On the contrary, the Act imposes heavy penalties, independent of the amount of rebate paid, and as each shipment constitutes a separate offense, the law in its measure of fine and punishment is a terror to evil doers. But for the public wrong and for the interference with the equal current of commerce these penalties or fines were made payable to the Government.

If by the same act a private injury was inflicted a private right of action was given. But the public wrong did not necessarily cause private damage, and when it did, the pecuniary loss varied with the character of the property, the circumstances of the shipment and the state of the market, so that instead of giving the shipper the right to recover a penalty fixed in amount or measure, the statute made the guilty carrier liable for the full amount of damages sustained—whatever they might be and whether greater or less than the rate of rebate paid" (p. 206).

Section 8 of the Act provides that in case any common carrier shall violate any of the provisions of the Act, such carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation. In this section, and this section only, is to be found the basis of the right to recover damages in civil suits for violations of the Commerce Act. The words "any act, matter or thing prohibited or declared to be unlawful" include rebates, other discriminations and the imposition of an unreasonable charge. In the same manner the measure of damage specified in Section 8 as "the full amount of damages sustained" is presecribed as the measure of damage in all cases and no distinction is made between cases involving a discrimination or rebate and cases involving an overcharge. For this reason, as clearly pointed out in the opinions below, the doctrine of the *International Coal Company case* is directly applicable in this case. We quote from the opinion below:

"It hardly needs to be pointed out, as we did in the Clark case, that the *ratio decidendi* of the Supreme Court does not differ from that applicable to the present case. The Supreme Court also distinctly decides that,

in the absence of proof of actual damage to that extent, the amount of rebate charged and proved to have been made by defendant, cannot be recovered as damages, and that it can never be made the measure of the damage to which plaintiff is entitled. No more in this case can the difference between what is found by the Commission to be the unreasonable tariff rate and that fixed as a reasonable one, be made the measure of the damage that the plaintiff has suffered. As pecuniary damages are neither alleged in the pleadings nor proved in the trial, the plaintiff made out no case upon which recovery of damages could be had" (R. 148).

To the argument, that at common law the measure of damage was the amount of the overcharge, the Court, after referring to the opinion in the *Abilene Cotton Oil Case*, stated:

"We think this whole opinion tends to emphasize the distinction between the common law rights of action referred to, and the right of action created and defined by the act. A situation where the rates paid were the rates fixed by the act, as the only legal rates that could be demanded or paid, even though those rates are declared afterward by the Commission, in the performance of its administrative function, to be unreasonable, differs essentially from a situation where an *illegal* rate is, in the first instance, coerced or *extorted* by the carrier. The tariff rate paid by the shipper was the legal rate, any departure from which is made by the statute a misdemeanor and punishable by fine. There is consequently no 'overcharge' to be recovered as such, as in the cases cited at common law, and no coercion except that of the law. It is obvious that, even though the statute were silent as to the measure of damage applicable to the first situation, that measure could not justly be the same as in the second" (R. 152). * * * "The learned

counsel for the defendant in error seems to argue that this statute creates a *general* liability, independent of any relativity, limitation or qualification, as soon as a violation of the act is shown. That this is not so, is apparent. It is not a *general* liability that is imposed by the act, but a particular liability to the person injured 'for the full amount of damages sustained in consequence of any violation of the provisions of the act.' The liability thus defined is the only civil liability anywhere imposed, and no other or different civil liability can attach itself to *any* violation of the act. The liability thus imposed being the same for all violations of the law, without exception, that liability, as defined by the statute, is to the 'person or persons injured for the full amount of damages sustained in consequence of *any* such violation of the provisions of this act.' We cannot avoid the plain and exigent meaning of this language. It is impossible, in view of it, to attribute to Congress an intention to apply it to only a portion of the offenses against the act" (R. 153).

Again, the Court below, after calling attention to the fact that Section 8 puts all shippers prosecuting suits for damages on the same footing, stated:

"In like manner it follows that the measure of damages sustained by a shipper in consequence of any violation of the act, must be the same in all cases. We find no authority in the act itself, or in the decisions of the Supreme Court, for applying a different measure of damage in the case of any violation of the act, than that established by the eighth section, viz., 'the full amount of damages sustained' by reason thereof. To hold that, in one case actual damage must be proved, and in the other not, introduces confusion in the administration of the law, for which the only justification must be the express and mandatory requirement of the stat-

ute or the express and controlling decision of the Supreme Court (R. 155). * * * The language of the eighth section makes the measure of damage therein prescribed applicable to *every* violation of the act. Nor has the Supreme Court in any case decided otherwise. Its reasoning as to the measure of damages established by the eighth section, is also applicable to *every* violation of the act,—to one that depends for its illegality upon a finding of the commission, as well as to one where such finding is unnecessary. The argument to the contrary is largely technical, and tends to make a mockery of the right to a jury trial and to defeat the just purposes of the act in that respect" (R. 159).

As to Mr. Meeker's discrimination claim, no argument is needed to show that the doctrine of the *International Coal Company Case* is applicable. Both cases involved alleged rebates, and in both cases it was assumed, as a matter of law, that the damage equalled the amount of the alleged rebate. Counsel endeavors to avoid the force of the *International Coal Company* decision by suggesting that the report of the Commission establishes as a *prima facie* fact that Mr. Meeker was damaged in the amount of the alleged rebate. His contention is not sound.

In the first place, what counsel refers to as a fact established *prima facie* by the report, is but a conclusion by the Commission, which conclusion, as we have pointed out under the foregoing point, is not evidence and should not have been received as evidence in this case, *prima facie* or otherwise. In referring to such conclusion as evidence counsel merely argues in a circle and thus tries to avoid, without answering, the truth clearly stated in the opinions below, that this conclusion on the part of the Commission may not be consid-

ered as proof of the defendant's liability, *prima facie* or otherwise. The conclusion which counsel points to as *prima facie* is a conclusion of law. The Commission expressly and avowedly awarded damages to the plaintiff on the discrimination claim on the theory that the amount of the rebate constituted the measure of damage.

Counsel suggests that the Railroad has not proved that the Commission assessed the damages as a matter of law and without proof of actual damage. His contention is that on the record in this case it must be assumed that the Commission took evidence as to the plaintiff's actual damage and found the amount of the damage, not as a conclusion of law, but as a fact based on proper evidence. This suggestion is the best possible illustration of the vice of the contention that such conclusions of the Commission should be received as evidence of facts. It was to avoid just such ingenuity and misunderstanding that Congress specified in Section 14 that in case damages are awarded the report shall include findings of fact on which the award is made.

Again, counsel's ingenuous suggestion puts him in the position of one having invoked the jurisdiction of this Court on the ground that important questions of law were to be decided, and then arguing that the questions of law are not applicable because of a defect in defendant's proof. His ground for asking the unusual relief granted upon this writ of *certiorari* was that the legal questions involved were new and of great importance and that the plaintiff should be relieved of the expense and delay incident to a new trial of the case, at which the rulings of the Circuit Court of Appeals would be binding, thus necessitating at the end an appeal to this Court from the final judgment. Having been admitted to this Court on this ground while a new trial is pending, he seeks to deprive the defendant

of the new trial already granted, on the ground of failure of proof at the first trial. As the writ was granted solely in furtherance of justice, it would seem unfair to attempt to make the judgment against the defendant final upon a technical contention as to lack of proof at the first trial. Moreover, the Circuit Court of Appeals, upon considering all the facts in the case, determined that the Commission awarded the damages, not upon material and proper evidence, but merely as a conclusion of law. Thus, as to the excessive charge claim, the Court below states: "The difference between the two (rates) was expressly and avowedly awarded as damages to the plaintiff" (R. 158). It would seem in any event that the Circuit Court of Appeals' determination as to the facts would be taken as conclusive in this Court and that its determination to grant a new trial should not be overruled unless the rules of law applicable to this case are such as to make a new trial useless. The question, therefore, before this Court under this point is whether or not the rule of this Court in the *International Coal Company Case* is applicable to the Meeker cases. If so, a new trial should be had, governed by those rules.

As a matter of fact, it appears clearly from the reports of the Commission that the Commission granted damages at the difference between the two rates and as a matter of law, and that it had before it no material evidence as to plaintiff's damage. At the close of its discussion of the discrimination case, the Commission states: "We are of the opinion and so hold, that complainants have sustained the allegation of unjust discrimination * * *. Reparation with interest from August 1, 1901, will be awarded on this account" (R. 23). No reference is there made directly or indirectly to the allegation of damage. At the close of the first report the Commiss-

sion said: "We are further of the opinion that reparation should be awarded upon basis of the rates herein found to be reasonable upon all shipments of coal by complainants from the Wyoming region to Perth Amboy since August 1, 1901. The amount of reparation which should be awarded under our finding in this case cannot be ascertained from the exhibits now on file and such further proceeding will be had as may be necessary to determine the amount of money due complainants" (R. 47). The words "the rates herein found to be reasonable" refer back to the preceding paragraph (R. 47) in which the lower rates are stated. The Commission, has, therefore, in its report clearly stated that it awarded the reparation not on the basis of the complainant's damages, but upon the basis of the difference between the rates charged and the "rates herein found to be reasonable." As to the subsequent hearing, the report states: "A further hearing has been held and complainant has presented exhibits showing the total number of tons of each variety of coal shipped and the amount of reparation due on such shipments" (R. 11). The same schedules, which, as stated in the second report of the Commission, constituted the evidence at the further hearing, were placed in evidence at the trial. The schedules were produced at the trial by Mr. Meeker and were admitted by Mr. Meeker and his counsel to be exactly the same as those offered in evidence before the Commission (R. 58, 76). The schedules were offered in evidence as Defendant's Exhibits A and B (R. 77 and 80). They are printed at pages 87, 88 and the following pasters marked "143-192." These schedules show the tons shipped, the amounts paid, the amount which would have been paid in the discrimination claim upon the so-called Sixty-five Per Cent basis, and the amounts which would have been paid under the exces-

sive charge claim on the basis of the so-called reduced rates. The only other evidence contained in the schedules, if it may be called evidence, is an arithmetical computation. These are the schedules which the Commission refers to in its second report as "The exhibits showing the total number of tons of each variety of coal shipped and the amount of reparation due on such shipments" (R. 11). We therefore have on the face of the reports a statement to the effect that the evidence of damage before the Commission constituted the arithmetical computations contained in these schedules and nothing more. The Court below was certainly justified in finding from this evidence that the Commission proceeded arbitrarily and without any legal evidence of damage under the mistaken view that "the fact and amount of pecuniary loss is a matter of law" (230 U. S. 204). The result of such a mistaken action on the part of the Commission has no legal effect, either as an award, a conclusion, or a finding. (*I. C. C. v. L. & N. R. R. Co.*, 227 U. S. 88).

It is claimed in the brief for the petitioner that the second report of the Commission states that the railroad conceded the accuracy of the reparation due (Petitioner's Brief, pages 19 and 50). This is not so. The contention is based upon a mere play upon words. The sentence relied upon is as follows (We quote from the supplemental report of the Commission. R. 11): "A further hearing has been held and complainant has presented exhibits showing the total number of tons of each variety of coal shipped and the amount of reparation due on such shipments. These exhibits have been examined by defendant and admitted to be correct." By reference to these exhibits (R. 87, 88 and following pasters marked "143-192") it will be seen that the concession referred only to shipments, the freight paid and the arithmetical

computations thereon. There is no concession that any reparation was due. The words in the supplemental report "And the amount of reparation due on such shipments" are merely the conclusion of the Commission to the effect that the excess of the rates charged over the rates found to be reasonable constitutes "the amount of reparation due." The Commission erroneously assumed, as a matter of law, that the excess was the amount of reparation due. But to make it perfectly clear that the statement as to "reparation due" is a conclusion of the Commission and not a concession by the Railroad, Mr. Meeker was asked to state just what the Railroad did admit. He testified as follows: "Q. When you say these sheets were approved by the Lehigh Valley, you mean nothing more, do you, than they were turned over to the Lehigh Valley Accounting Department for the purpose of checking up the figures in them? A. That is all" (R. 77, see also R. 74-78).

The Commission has always granted reparation upon the basis of just such examples in subtraction. The Commission has frankly established this rule of damage as a matter of law and entirely without reference to the damage sustained. *Cattle Raisers' Association v. Ft. Worth & D. C. Ry.* (VII., I. C. R. 513, 553). In cases involving comparatively small amounts there may have been no material advantage in contesting this erroneous conclusion of the Commission, but where the complainant, as in this case, has with remarkable astuteness stored up, through a long series of years, a claim for over a hundred thousand dollars while his competitors were sleeping on their rights, the question assumes great importance and the time has come to ask whether a shipper who has not been injured may nevertheless recover, under the guise of damages, an enormous preference. As

stated by this Court in the *International Coal Company case*, "Congress had not then and has not since given any indication of an intent that persons not injured might, nevertheless, recover what, though called damages would really be a penalty, in addition to the penalty payable to the Government" (230 U. S. 194 at 200).

The measure of damage applied by the Commission, for which petitioner's counsel contends, is but a rule of convenience based, possibly by analogy, upon the rule in extortion cases before the Act was passed. The rule, however, when applied to measure damages for a violation of the Act, is anomalous and in every way inconsistent with the true purpose of the Act.

In the first place, as clearly stated in the opinion below, the Commission's rule of damages selects a particular kind of violation of the Act and applies to it a special rule of damage, whereas the Act itself (section 8) has but one measure of damage for all, namely, "the full amount of damages sustained."

In the second place, the main purpose of the Act, namely, uniformity, prevents the application of any such rule of damages. Conceding that a carrier has filed an unreasonable rate which by law it must charge so long as it remains established, the law compels the payment of that same rate by each and every shipper. The rate becomes the law for each similar transaction and is automatically incorporated in all of the commercial transactions affected by it. The shipper does not lose the excess as he would lose it had an excessive rate been extorted from him individually by an act of the carrier. It is fair to assume that the burden has fallen upon the consumer and that the shipper has made his percentage of profit out of the excess in the freight charge just as he has made his percentage of profit out of every other transaction going to make up the final cost to the con-

sumer. The Commerce Act protects the shipper from the loss which he formerly would have sustained in paying an extortionate rate. In fact, the main purpose of the Act was to save the shippers from just such losses. The Act, by maintaining strict uniformity, enables the shipper, as it were, to pass along his loss, if any, to the consumer. The public at large, including shippers and consumers, are protected from the payment of excessive rates both by the power of the Commission to fix rates for the future and by the penalties prescribed in Section 10 of the Act. No intent is found in the Act to further penalize the carrier by way of compelling it to restore arbitrary sums to shippers who have sustained no damage.

The Commission has not found that Meeker & Co. did not receive from their customers the entire freight charge plus a percentage of profit on the freight charge, including the excess charge. If Meeker & Company's price was the price at the mines plus the freight rate, then Meeker & Company surely have not been damaged. Even if the price at tidewater were a fixed price, which included the freight charge, that price must have been made with reference to the amount of the freight charge. The requirements of the Act, that the freight charged must be uniform, made it certain that any tidewater price fixed must include the entire freight charge. These are but circumstances controlling on the question of Mr. Meeker's damages, all of which were entirely ignored by the Commission; with the result that the report states no facts upon which a conclusion can be based to the effect that Meeker & Company sustained damage, or the amount of such damage, if any.

Finally, if as a matter of law, the measure of damage in reparation cases is to be the difference between two rates established by the Commission, then the provisions

of the Act by which the defendant's right of trial by jury is so carefully preserved are nullified. There is nothing left for a jury to decide. The evidence which Congress said must be *prima facie*, becomes conclusive.

It is not necessary to repeat here the logical discussion of the history of the reparation features of the Commerce Act contained in the opinions of the learned Court below both in this case and in *Lehigh Valley v. Clark* (207 Fed. 717). (The latter opinion is printed as an appendix at the end of this brief.) That Court points out with great clearness that since 1889 it has never become the purpose of Congress to make the conclusions of the Commission as to defendant's liability, evidence in a suit for damages; but that, on the contrary, the successive amendments have clearly preserved the intention that all of the material issues in a damage case should be tried by an unprejudiced jury. Nothing can be more clear than that litigants have been warned with painstaking repetition that the use of the Commission's orders in a reparation case will be confined to the reading before the jury of specific relevant facts stated in the reports. The opinion below is in full accord with other judicial interpretations of authority and long standing.

In *Interstate Com. Com. v. L. & N. R. R. Co.* (73 Fed., 409, at 414) District Judge Clark stated, as to the requirements of the reports of the Commission:

"For the Commission's investigation and opinion to have this intended value, however, it should, in fact, conform to the purpose of Congress in requiring such proceedings. It is not sufficient, therefore, in a report of its findings of fact and conclusions, to do so in such general way as not to disclose its views upon particular phases of the evidence, or its conclusions of law upon facts found with reference to the particular issues in

the case. Stated in another form, it is not sufficient for the report to be made up of mere conclusions. Its opinion or report should show what the issues in the case are, and what facts it finds in regard to such issues. The report should make suitable reference to the evidence adduced in regard to any particular question, where there is a conflict in the proof, showing how the Commission settles the disputed fact; or, if the evidence in regard to any issue is undisputed, state that fact. In other words, the report should give the parties to be affected, as well as the Court, in any judicial proceeding afterwards instituted, definite and distinct information as to what was found as facts, and the Commission's opinion thereof, such as would be necessary to make a judicial opinion sufficient and satisfactory for the purpose of ordinary litigation."

In *Cincinnati, New Orleans & Texas Pacific Ry. v. Interstate Com. Com.* (162 U. S. 184, at 196) this Court stated: "The reasonableness of the rate, in a given case, depends on the facts, and the function of the Commission is to consider these facts and give them their proper weight."

In *Darnell-Taenzer Lumber Co. v. Southern Pacific Co.* (190 Fed. 659) District Judge McCall stated: "If the conclusions or orders of the Commission were by the Act made *prima facie* evidence of the liability of the defendant, then the declaration is sufficient. But such does not seem to be the case. * * * If the Congress intended that the order making the award should be taken as *prima facie* evidence of the liability of the carrier, then it would seem that it did a useless thing in requiring the Commission by the terms of the Act to make findings of facts in cases wherein awards for damages are allowed. * * * If the order of the Commission making an award is given the force of a probative fact,

and taken as *prima facie* evidence of the liability of the carrier, then (as in the case before the Court) a condition might arise where, in the opinion of the Court, the order of the Commission is not warranted by any facts found and reported by it upon which it is presumed the order of award is predicated, and the Court would be unable to pronounce judgment for the plaintiff, even if no defence was interposed. In such a case the Court would be at a loss to know whether it should be controlled by the facts reported or the order made by the Commission in pronouncing its judgment" (p. 662).

The case of *Western New York & P. R. Co. v. Penn Refining Co.* (137 Fed. 343) involved a charge of discrimination in favor of shippers of oil in tank cars and against shippers of oil in barrels. The point in question arose in connection with an assignment of error to the admission of the following paragraph from the report of the Commission as evidence before the jury: "After full investigation and mature consideration * * * we hold, that where both modes of transportation are employed by the carrier and the use of one, the tank car, is not open to shippers impartially but is practically limited to one class of shippers, the charge for the barrel package in barrel shipments in the absence of a corresponding charge on tank shipments, resulting in a greater cost of transportation to the shippers in barrels on like quantities of oil between like points of shipment and destination than to the tank shipper, is an unjust discrimination subjecting the barrel shipper to an unreasonable disadvantage and giving the tank shipper an undue advantage, and that no circumstances and conditions have been disclosed by the evidence in these cases authorizing such discrimination by any of the defendant carriers" (p. 348).

The Court held that the admission of that statement as evidence was error, stating: "Taken as a whole it is argumentative, and when pronounced and admitted by the Court as 'a finding of fact,' was calculated unduly to influence and perchance to mislead the jury to the prejudice of the defendants by causing the belief, possibly on insufficient grounds, that the charge for the barrel package in barrel shipments of oil complained of was not reasonable and just as required by the Interstate Commerce Act. The subject to which it related was of vital importance in the case. Whether the charge for the barrel package was reasonable and just, or unjust and excessive, was a question to be decided by the jury on proper evidence, and not on mere arguments and legal conclusions of the Commission" (p. 348).

And at page 350:

"In proceedings at law under Section 16, as amended, for the enforcement of an order or requirement of the Commission, the parties are entitled to an impartial trial by jury, so conducted as to accord to them in full measure the enjoyment of their constitutional right. The procedure contemplated by the Act and, unless waived, required by the Constitution, is jury trial, accompanied with the usual safeguards furnished by a proper application of the principles of evidence and the proper submission of the case to the jury."

In Section 16, Congress has provided that the Commission shall state the facts upon consideration of which it arrived at its conclusion. Such statement may go before the jury as *prima facie* evidence of those facts. Upon those facts the jury, unembarrassed by binding instructions as to the weight to be given to the conclusions of the Commission, should be allowed, after due consideration, to arrive at an independent conclusion.

The jury, upon consideration of the facts might well arrive at an entirely different conclusion. In the last analysis, the jury, and the jury only, can decide whether or not the property of the railroad shall be taken from defendant and given to the plaintiff, and if so to what extent. The Act has provided that the jury shall have access to the facts upon which the Commission based its award. If we concede that Congress has the power to so change the rules of evidence, it is nevertheless clear that if in place of the facts which the Commission considered, the conclusions based on such consideration are made *prima facie* evidence, then there has been substituted for evidence of fact a prejudicial conclusion. Congress, in that case, has not changed the rules of evidence; but has attempted to forestall a fair consideration by the jury of the merits of the case.

THIRD POINT.

The Commission's opinions contain statements, arguments and conclusions which the act does not purport to make admissible as prima facie evidence in a suit for damages. In admitting the reports in evidence the Trial Court prejudiced the rights of defendant, making it thereafter impossible for the defendant to place before the jury its side of the case unembarrassed by the incompetent and misleading statements in the opinions.

The defendant objected to the admission of the opinions on this ground. The objection was overruled and exception taken (R. 64, 65, 70). Their admission was assigned as error (R. 102). The only theory upon

which the reports could have been admitted as a whole is that they contained "findings of fact" made by the Commission. We quote two illustrations of the so-called *prima facie* evidence thus introduced:

"It appears that prior to 1900 various anthracite coal carrying railroads in Pennsylvania, in their endeavor to control the output and sale of anthracite coal, had formed other and distinct corporate organizations * * *" (R. 18).

"L. S. Smith * * * made up a statement of cost to move one train of coal from Drifton * * * to Perth Amboy * * * and the return of empty cars, which statement is filed as Complainant's Exhibit No. 1. The total cost per ton shown by said exhibit is 76.54 cents" (R. 26, 27).

There is no possible excuse for placing before the jury what Mr. Smith said about the cost of carrying coal to tidewater, or what the Commission parenthetically stated to be the reason for organizing the various anthracite coal companies. What may have been the purpose of offering the whole report does not appear. The result was to fix in the jurors' minds two (among many) prejudicial hearsay statements; first, that the defendant was endeavoring with other anthracite roads to control the output and sale of coal, and second, that Mr. Smith said it cost $76\frac{1}{2}$ cents to carry coal to tide. Two bugaboos were dangled before the jurors. The defendant was in the "Coal Trust." The defendant was charging \$1.55 for transportation that cost it but $76\frac{1}{2}$ cents—100 per cent profit.

It is not enough to urge that these and many other hearsay statements dumped wholesale into the case before the jury could not have prejudiced the defendant because the case should have been taken from the jury and a verdict directed. Petitioner's counsel allowed the case to

go to the jury, confident of the result and desirous of obtaining any additional advantage which might result from that course (R. 92). Although it was an empty form, the jury did return a verdict (R. 99). Furthermore, it was the duty of the jury, even under the practice adopted by the trial Court and petitioner's counsel, to pass upon the evidential value of the "facts" submitted to it. Section 16 makes the facts stated in the report *prima facie* evidence. Such evidence the jury could value as it saw fit, or could deem of no value. But to do this the jury would have been compelled (as stated in the opinion below) "to examine that voluminous report to discover for themselves whether it contained any findings of fact bearing upon the question as to what actual damage had been suffered by the plaintiff, by reason of the unlawful conduct of the defendant" (R. 145).

The trial Judge instructed the jury with reference to the reports as a whole that "the suit is on the Report of the finding of the Interstate Commerce Commission and their finding is made *prima facie* evidence of the correctness of the amount the plaintiff is entitled to recover" (R. 91). And again, "There is no evidence in this case but the plaintiff's evidence, the Report of the Commission, the fact that it is not paid, and the other collateral evidence which was in support, or which was part of the history of the case, as to how it got here. So that the only evidence before you is the *prima facie* evidence of these claims. * * * (R. 92). "They (the reports and order) state the conclusions as required by the Act, and they state the findings of fact upon which the award is based, and they make that award in the sums that I have mentioned, upon sufficient findings of fact to sustain this suit" (R. 90).

In so conducting the case the Trial Court refused to follow the ruling of the Court of Appeals of the same

circuit in *Western New York & P. R. Co. v. Penn Refining Company* (137 Fed. 343). That case involved a claim for reparation which was awarded by the Commission because of an alleged discrimination in favor of shippers of oil in tank cars and against shippers of oil in barrels. The Trial Court admitted in evidence the reports of the Commission, which contained the arguments and conclusions of the Commission. The Court of Appeals held that the admission of these reports as a whole, was error, stating at page 351: "While not expressing the opinion that findings of fact even when mixed with incompetent matter should in all cases be excluded, we hold that, if the same be received, the Court should clearly separate and distinguish before the jury the findings of fact from the incompetent matter, and direct that the latter be wholly disregarded. Unless this course be pursued the parties are deprived at least in part of the benefits or safeguards intended to be secured to them under the constitutional guarantee of trial by jury. In omitting in the present instance to follow such method we think there was error and that the assignments must be sustained."

One of the conclusions contained in the report and complained of in the *Penn Refining Case* was the Commission's conclusion as to the existence of the discrimination. Such conclusion may be compared with the conclusion of the Commission that payments by the Lehigh Valley Coal Company to coal operators were in fact payments by the Lehigh Valley Railroad to shippers who were competitors of Meeker & Company (R. 23). As to such a conclusion, the Court of Appeals stated (137 Fed. 348): "Taken as a whole, it is argumentative, and when pronounced and admitted by the Court as 'a finding of fact,' was calculated unduly to influence and perchance to mislead the jury to the prejudice of the

defendants by causing the belief, possibly on insufficient grounds, that the charge for the barrel package in barrel shipments of oil complained of was not reasonable and just as required by the Interstate Commerce Act."

And at page 350: "The act does not make the mere legal opinions, arguments or reasons of the Commission *prima facie* evidence or evidence of any kind in any judicial proceeding. It was not the intent of the act to introduce into proceedings for the recovery of pecuniary reparation awarded by the Commission elements of uncertainty, complexity or confusion, foreign to any orderly system of judicial procedure."

There was not the slightest need or justification for placing the Meeker report as a whole before the jury. Even had the Court instructed the jury to disregard certain portions of the report the prejudice to defendant could not be avoided. In fact, the very act of pointing out the matter to be disregarded might well exaggerate the injury. One of the clearest duties of the trial Court is to keep from the hearing of the jury irrelevant and prejudicial matter. It would have been a simple matter for the trial Court to examine the report in advance and pass upon what should go to the jury. The Court should have separated it and submitted to the jury the facts, if any, stated in the report.

In *Darnell-Taenzer Lumber Co. v. Southern Pacific* (190 Fed. 659, at 662), District Judge McCall stated: "If the conclusions or orders of the Commission were by the act made *prima facie* evidence of the liability of the defendant, then the declaration is sufficient, but such does not seem to be the case. The act provides that the report of the Commission shall include the findings of fact only in cases in which awards for damages are made and that such findings of fact and orders of the Commission shall be *prima facie* evidence of the facts there-

in stated upon the trial of a suit in the United States Circuit Court brought to recover such awarded damages. 'The act does not make the mere legal opinions, arguments, or reasons of the Commission *prima facie* evidence or evidence of any kind in any judicial proceeding.' *Western New York Ry. Co. v. Penn. Refining Co.*, 137 Fed. 350."

And again, at page 663: "It is only facts found by the Commission and alleged in the declaration that can be considered in deciding whether or not a cause of action is stated."

Although it has been held that in a case tried by the Court without a jury the entire report is admissible, the cases so holding recognize the impropriety of such procedure in a trial by jury. *Southern Ry. v. St. Louis Hay & Grain Co.*, 153 Fed. 728, at 733. (This case was reversed on other grounds; 214 U. S. 297.) *C. B. & Q. v. Feintuch*, 191 Fed. 482.

FOURTH POINT.

Section 16 of the Act to Regulate Commerce is unconstitutional, insofar as it deprives the defendant in a damage suit of a fair trial by jury.

At the trial the defendant objected on this ground to the receipt in evidence of the opinions and orders of the Commission (R. 61, 63, 67, 70). The defendant also requested the trial Court to direct a verdict for the defendant upon this ground, which request was denied and exception taken (R. 94). The Court in effect charged the jury that the reports and orders of the Commission were *prima facie* evidence of defendant's

liability, and entitled plaintiff to judgment in the absence of controlling circumstances or evidence to the contrary (R. 91). Defendant duly excepted (R. 200), and assigned said charge as reversible error in its assignments of error 8 to 19 (R. 103-105).

In the earlier case of *Western New York & P. R. Co. vs. Penn Refining Co.* (137 Fed. 343), the learned Court of Appeals below said: "The constitutionality of the provisions making 'findings of fact' *prima facie* evidence before a jury has been challenged by sundry assignments of error, but is, we think, beyond reasonable question. The constitutional guarantee relative to trial by jury in the courts of the United States does not exclude legislative authority to effect convenient changes in the rules of evidence, involving no detriment to litigants."

In view of this decision an extended reargument before that Court of the constitutional question was not attempted. As to this, the Court in its opinion below stated: "In view of this decision (*The Western New York & P. R. Co. Case*), counsel for the plaintiff in error does not attempt a reargument of the question before this court. The question as to the other grounds of constitutionality, is disposed of by the view taken as to what may be the proper interpretation and application of the provisions of the statute."

It is clear that the provisions of Section 16 are unconstitutional if, and in so far as, they take from the jury the decision of the essential issues of fact and substitute for the judgment of the jury the judgment of the Interstate Commerce Commission. The Court below had this in mind when, in the *Penn Refining Company case*, it interpreted the section as effecting only "convenient changes in the rules of evidence involving no detriment to litigants" (137 Fed. 350).

In the case at bar the trial Judge extended the meaning of the provision to cover the right to impose upon the jury the conclusion of the Commission as conclusive of liability in the absence of controlling circumstances to the contrary. The trial Judge further allowed in evidence before the jury, arguments, opinions and conclusions of the Commission as distinguished from facts stated in the report. It was clearly the duty of the trial Court to avoid any interpretation or application of the provision that would render its validity doubtful. (*United States vs. Delaware and Hudson Company*, 213 U. S. 366, 407.) But no attempt was made by the trial Court to protect defendant's right to a fair trial. On the contrary, a course was pursued that so clearly prejudiced the defendant's case as to render the jury trial a farce. In practice the section was applied not as a "convenient change in the rules of evidence," but on the contrary as a subversion of defendant's constitutional rights.

We are convinced that there is very grave doubt as to the constitutionality of the reparation provisions in Section 16, regardless of how they are applied. Our conviction is so strong in this respect that we present the reasons therefor, having in mind at the same time that in the present case the application of the section was so prejudicial to the defendant's rights that it is not strictly necessary to decide in this case whether the section is constitutional if properly interpreted and applied. The provisions of any statute can be so misinterpreted and misapplied as to render the statute as applied invalid, although the statute in general may, if properly interpreted and applied, be valid and enforceable.

In the original Interstate Commerce Act of 1887 (Sec. 16) an attempt was made to provide for enforcing damage awards of the Commission in equity suits. No distinction was made between the practice for enforcing an order involving a rule of future conduct and an order for the payment of money. Certain parties came before the Commission seeking awards of damages, but the Commission, in 1888, took the position that a claim for pecuniary damage presented a case at common law in which the defendants were entitled to a jury trial.

(*Councill v. Railroad Company*, I, I. C. C. Rep. 339, at 344; *Heck & Petree v. Railroad Company*, I, I. C. C. Rep. 495 at 502; *Riddle, Dean & Co. v. Railroad*, I, I. C. C. Rep. 594, at 607; *Rateson v. Railroad*, III, I. C. C. Rep. 266, at 279; *Macloon v. Railroad*, V, I. C. C. Rep. 84, at 92.) In its first decision (the *Councill case*) the Commission stated: "Under the Seventh Amendment of the Constitution of the United States the defendant, in any case at common law, is entitled to a trial by jury. This claim is, in its nature, an action of trespass, and therefore presents such a case; and when, on the hearing, the complainant offered evidence of pecuniary damages as a basis for an award, the Commission, because it could not give such a trial, declined to go into that question." (I, I. C. C. Rep., at 344.) And, in the *Macloon case*, the Commission said: "Besides this, it seems clear that where in any case the sole question involved is one of reparation for past damages, a constitutional right to jury trial exists, and the 16th section failed to provide for jury trial in any case whatever." (V, I. C. C. Rep., at 92.) In its first annual report the Commission stated that it "Has not discovered in the statute a purpose to confer upon it the general power to award damages in the cases of which it may take cognizance.

The failure to provide in terms for a judgment and execution is strong negative testimony against such a purpose; but what is perhaps more conclusive is that the act must be so construed as to harmonize with the Seventh Amendment to the Federal Constitution, which preserves the right of trial by jury in common law suits." (V, I. C. C. Rep. 92.)

Thereupon Congress, in 1889, amended the Act with the specific view of omitting from the Act the provisions for the enforcement of the Commission's damage awards. Congress, as well as the Commission, correctly assumed that to enforce an award of damages by the Commission, as such, would deprive the carrier of its right of trial by jury. By the amendment of 1889, Section 16 was amended so that the provision for the enforcement of the award in a court of equity was eliminated and provision made for a trial by jury, at which trial the findings of fact set forth in the report of the Commission "shall be *prima facie* evidence of the matters therein stated." (XXV Statutes at Large, 861.)

Technically this amendment attempts to preserve to the carrier in its entirety the right of an unbiased jury trial. If in practice a petition based upon a reparation order could be treated by the trial Court as a special proceeding, the merits of which involved the trial of certain questions of fact by a jury, perhaps these questions of fact might be so framed and sent to the jury as to reasonably protect the carrier's rights. If, on the other hand, the practice is to be that followed in the present case, the jury trial becomes a farce. The trial Court admitted the so-called report of the Commission with all its accusations, arguments and hearsay statements; instructed the jury that the Interstate Commerce Commission had found the defendant guilty of a wrong whereby Meeker & Company were damaged to the extent of one hundred

and seven thousand dollars and told the jury that it must enforce the order unless the carrier produced "controlling circumstances or evidence to the contrary" (R. 91). As pointed out in the opinion below, the trial Court entirely misinterpreted the meaning of Section 16 of the Act. However, regardless of whether the Act was correctly interpreted or not, the result is that the carrier has not really had a trial by jury of the issues relevant to this damage suit.

The issues of fact which the Commission and Congress intended to preserve for trial by jury are the issues: (a) Has the carrier committed a wrong whereby the shipper has sustained injury? (b) If so, to what amount of damages does the fact and nature of the injuries entitle the shipper? The trial Court, however, substituted an entirely different issue. The jury in this case was asked to decide whether or not the defendant had submitted controlling circumstances to show that an award of the Commission was erroneous and false. Similar issues have been repeatedly submitted to this Court in equity cases and this Court has consistently held that the only controlling circumstances which will invalidate the conclusion of the Commission are failure on the part of the Commission to give a fair hearing. In the present case the defendant was required to go much further and to persuade twelve laymen that the experienced Commission reached a wrong conclusion after a consideration of the same evidence, assumed to be fair and deliberate. If Congress intended that awards of reparation should be enforced this way, it merely substituted a Court of Law for a Court of Equity and left the defendant as before, without a trial by jury of the issues of fact upon which the alleged liability rests. Congress intended the reparation order should be enforced only in case a jury, after a fair trial,

decided: (a) That the carrier has committed a wrong whereby the shipper has sustained injury; (b) That the shipper was damaged thereby in an amount determined by the jury. Such intention has not been carried out in this action, even remotely.

It is needless to state that the constitutional guarantee of the right of trial by jury is a real and practical guarantee. It relates not to technical forms of procedure but to the fundamental right to have issues of fact passed upon by unprejudiced jurors. As to the Seventh Amendment, Mr. Justice Brewer stated (*Walker v. Southern Pacific*, 165 U. S. 593, 596): "Its aim is not to preserve mere matters of form and procedure but substance of right. This requires that questions of fact in common law actions shall be settled by a jury, and that the Court shall not assume directly or indirectly to take from the jury or to itself such prerogative." Presenting the Commission's opinions, arguments and conclusions to a jury with the admonition that the jury must enforce the Commission's award in the absence of controlling circumstances or evidence to the contrary, is but the ~~baldest pretence of observance of the form of a trial by jury without the substance. No one believes that a fair trial by jury can be conducted in any such way.~~

In fact, we fail to see how a fair jury trial can be had in any case where the issues of fact are presented to the jury as issues already determined by the Interstate Commerce Commission against the defendant. The prestige of the Commission, and the knowledge that the question has already been passed upon by jurors of far greater experience are bound to have a controlling influence upon the minds of ordinary jurors. However carefully the case is presented, and however much the jury is warned not to adopt the conclusions of the Com-

mission, the fact remains that there has been placed before the jury the irrelevant and immensely prejudicial fact, that the Commissioners have reached a conclusion adverse to the defendant. No one believes that the carrier, under these circumstances, gets a fair trial by jury. No one who has ever served on a jury, or who has ever summed up before a jury, believes that the defendant has a fair trial.

These considerations were controlling when Congress limited the use of the Commission's reports and orders, before the jury, to the bare statement of the facts stated therein. Congress assumed that the trial Court would be as jealous of the defendant's rights, as was the Commission in 1888 and Congress in 1889. It assumed that courts and the Commission would adopt rules of practice whereby specific facts could be stated to the jury without including statements, possibly not true, unduly prejudicing the defendant's rights. It provided in Section 14 for a separate statement of such facts in the reports. The Commission itself for many years had a rule requiring the parties to submit proposed findings. But, even if the practice were technically correct, this fundamental objection remains: The case cannot be presented to a jury without conveying to the jury knowledge that the issues have already been decided against the defendant by a Commission whose experience and ability must exceed that of the average jurors. However great is the care taken ~~there is this~~ inherent vice and practically, if not technically, the right of trial by jury is abrogated.

The prejudice to the defendant as a litigant is aggravated by the fact that in order to maintain uniformity of administration under the Commerce Act, it has seemed necessary to impose upon the jury as conclusive, ~~the~~ the Commission's determination as to defendant's wrong-

doing. It was said in the *Abilene Cotton Oil Opinion* (204 U. S. 426) that a shipper seeking reparation predicated upon the unreasonableness of an established rate must primarily invoke redress from the Commission "which body alone is vested with power originally to entertain proceedings for the alteration of an established schedule because the rates fixed therein are unreasonable." We can give no more cogent statement of the doctrine of that case than that of Mr. Justice Pitney, in his dissenting opinion in *Mitchell Coal Co. v. Pennsylvania R. R.* (230 U. S. 247, at 295): "In short, what the *Abilene Cotton Oil case* decides is, that with respect to interstate commerce the Act by its own language prescribed *how it should be determined what rates should be charged* by carriers, and how such rates should be made manifest; and that while Sec. 1 of the Act prohibited any charge beyond just and reasonable rates, it imposed the duty of establishing and publishing schedules, to the very end of enforcing that provision, and in the effort to prevent unjust preferences and discriminations it rendered it *unlawful to depart from the established schedules* until they were changed by the administrative Commission; wherefore the rate thus established and published must be deemed in law a reasonable rate for all purposes affecting the rights of the carrier and shipper between themselves *until it had been altered by the Commission*, which might be done if they found it unreasonable in fact."

But the same reasoning which holds the established rate to be conclusively legal in the absence of a finding to the contrary by the Commission, renders the determination of the Commission, when found, equally conclusive. Hence, as stated by Mr. Justice Lamar, in the controlling opinion in the *Mitchell Coal Company Case*

(230 U. S. 247, at 258): "Such orders, so far as they are administrative, are conclusive, whether they relate to past or present rates, and can be given general and uniform operation, since all shippers, who have been or may be affected by the rate, can take advantage of the ruling and avail themselves of the reparation order."

As stated in the opinion below, on re-hearing, the logic of the situation is that "Where the illegality of the act charged depends upon whether it be reasonable or unreasonable, the option given by section 9 cannot be literally interpreted, as the determination of this issue calls for an exercise of the discretion of the administrative body. When that administrative function has been performed and the rate complained of has been found to be unreasonable or unjust, such finding is conclusive, whether it relate to past or present rates or practices. As said by Mr. Justice Lamar, it is as if the reasonable rate or practice was established in the statute itself" (R. 154).

In practice, then, must not the jury trying a damage case be given binding instructions that the carrier has committed a wrong? Of the two elements inherent in every damage suit, the *injuria* and the *damnum*, must not the issue as to the former be decided against the defendant before the jury is called? The defendant thus enters the case not only with the prejudice attending an unfavorable decision by the Commission, but under a conclusive presumption of guilt.

We cannot believe that when the Commission, in 1888, refused to pass upon damage claims because such action would deprive the litigants of the right to a fair jury trial, and when Congress sought to preserve that right by the amendment of 1889, either the Commission or Congress had it in mind, to preserve solely the right

to assess damages before a jury. Neither the Commission nor Congress intended to compel the carrier to face a jury under a conclusive presumption of guilt and submit to that jury's assessment of damages. Such a result, if contemplated, must have made the conscious effort to preserve the carriers' rights appear ludicrous. If the railroad must go before the jury admitting its guilt, it would be far better for it that damages be assessed by the Commission than by a jury prejudiced at the outset against the defendant by the forced admission of guilt.

But what is this guilt which the defendant is estopped to deny? It consists in charging an established rate or conforming to an established practice which, when and as charged, and when and as performed, constituted the only legal rates and the only legal practice. In short, the Railroad is convicted of guilt for conforming with the law of the land. It is true that the law of the land has become changed by a recent determination of the Commission. And this determination becomes the law for past, as well as present, transactions. But, must the carrier go before a jury convicted of having violated from 1901 to 1907 a law made in 1911?

The main purpose of the Commerce Act is to afford an effective means for redressing the wrongs resulting from unjust discriminations and undue preference. To effect this uniformity it seems that in a reparation case the acts of the carrier must be judged, as to their legal quality by comparison with a conclusive fiat of the Commission. The Commission's fiat is rendered long after the act to be judged was committed. But by "projecting" an administrative fiat into the past the carrier is placed in the position of charging more than an established rate. This of course would be the baldest fiction

as there could not be two established rates at the same time for the same service. The carrier if guilty at all was guilty of charging an unreasonable established rate. Its act is lawful or unlawful according as it was reasonable or unreasonable. It must be judged by the standards existing at the time it acted and not by an artificial standard set up at a future date.

Of course, a carrier cannot be guilty of violating in 1907 a law made in 1911. It could, however, be guilty of violating the law made in 1887, or in 1906, providing (in section 1) that every unjust and unreasonable charge is prohibited and declared unlawful. As stated by Mr. Justice Lamar, in his opinion in the *Mitchell Coal Company Case* (230 U. S. 247, at 255): "There are two classes of acts which may form the basis of a suit for damages. In one the legal quality of the practice complained of may not be definitely fixed by the statute so that an allowance, otherwise permissible, is lawful or unlawful, according as it is reasonable or unreasonable." These two classes of acts are well illustrated, on the one hand by the act of a carrier in charging less than an established rate, and on the other hand, by the act of a carrier charging the established rate, which, although the only lawful rate, is nevertheless unreasonable in fact. If put on trial for charging less than a tariff rate the guilt of the defendant is determined by comparing the rate charged with a definite rate established by law. The legal quality of the act has been definitely fixed in advance by statute or administrative act. But, where the legal rate is charged and the act is lawful or unlawful, according as it is reasonable or unreasonable, the guilt of the carrier must depend solely upon the question of reasonableness and not upon a subsequent administrative act of the Commission. When the Commission does subsequently pass upon the

reasonableness of a rate already charged, it passes upon the guilt or innocence of the carrier. It has no other possible function, and this truth cannot be hidden beneath the fiction that the Commission is making rates or laws for the past. The determination of the Commission as to the reasonableness of a past rate is but a trial by an administrative body of the issue of the carrier's guilt or innocence. For since the quality of the act is to be determined, not by reference to any law or order in force when the act was committed, but solely by reference to whether the rate or practice complained of was reasonable or unreasonable, it follows that if a carrier is sued for damages upon the alleged ground that an established rate charged in the past was unreasonable, the basis of recovery must be the unreasonableness of the rate. The Commission in determining that issue does exactly what a jury would do, if the case were tried by it, and nothing more. The Commission, when it determines what should have been a rate in the past, does not fix or prescribe a rate. The rate has been charged and is beyond fixing. The only thing the Commission can do is to qualify the past conduct as lawful or unlawful. As stated by Mr. Justice Lamar in the opinion in *Baer Bros. v. Denver & R. G. R. R. Co.* (233 U. S. 479 at 486): "But awarding reparation for the past and fixing rates for the future involve the determination of matters essentially different. One is made by the Commission in its *quasi-judicial* capacity to measure past injuries sustained by a private shipper; the other, in its *quasi-legislative* capacity, to prevent future injury to the public."

Since, as it seems, this determination of the Commission must be conclusive, the damages, if collected at all, must be taken without a trial by jury of the

fundamental issue of fact, namely, the question of defendant's guilt or innocence. As stated in the *Mitchell Coal Company Case*: "The courts have not been given jurisdiction to fix rates or practices in direct proceedings, nor can they do so collaterally during the progress of a law suit when the action is based on the claim that unreasonable allowances have been paid. If the decision of such questions was committed to different courts with different juries the results would not only vary in degree, but might often be opposite in character—to the destruction of the uniformity in rate and practice which was the cardinal object of the statute. The necessity under the statute of having such questions settled by a single tribunal in order to secure singleness of practice and uniformity of rate has been pointed out and settled in the *Abilene, Pitcairn and Robinson cases* * * * ." (230 U. S., at 255.)

But the Meeker cases, bringing up for consideration, as they do, the actual use in a damage case of the Commission's report, as distinguished from the absence of such report as in the *Abilene, Pitcairn, Robinson, International Coal, Mitchell and Morrisdale cases*, involve questions of grave importance not raised in the former cases: Is defendant's right of trial by jury protected in a damage case, when the fundamental issue as to the lawfulness of the acts complained of must be conclusively determined, after the event, by an administrative board? Can a judicial determination by the Commission be substituted for the verdict of a jury? Did Congress, in passing the 1889 amendment, intend or in any way provide, that the issue of reasonableness should be taken from the jury and judicially determined, *after the event*, by the Commission?

Having determined that defendant may not be tried without a conclusive finding of the Commission, the question remains: Should defendant be tried with a conclusive finding of the Commission? Although it is necessary and proper to limit the remedy Congress intended to grant, Congress alone can create a remedy. If Congress has attempted to provide an incidental remedy, based upon a finding by the jury that an established rate was unreasonable, this remedy can be limited, and even abrogated, to give full effect to the main purposes of the act. But, until Congress has again acted, an entirely different remedy based upon a conclusive judicial determination by the Commission cannot be substituted.

As pointed out in the dissenting opinion in the *Mitchell Coal Co. case*, the shipper is, by rule of necessity, deprived of his jury trial unless he prevails before the Commission (230 U. S. at 281). But does not the same rule of necessity deprive the carrier of its right to a jury trial and in a much more dangerous and pernicious sense? Where a carrier charged the established rate, which the act compels it to charge, it would seem that the reasonableness of its conduct must be submitted to a jury before damages can be adjudged. The lawfulness of conduct should not be determined by arithmetical comparison between a legal rate charged and a fictitious rate subsequently fixed by an administrative body. To entitle the shipper to damages, a fair preponderance of legal evidence relevant to the issue of reasonableness and fairly submitted to a jury should be essential.

Let us assume, as might well be the case, that the rates attacked by Mr. Meeker had been found reasonable by the Commission in 1898. (Slightly lower rates were in fact found reasonable by the Commission in 1891) (R. 46, 47). Owing to changed conditions the

Commission decides in 1911 that the rates should be further reduced and attempts to "project" this decision, with the force of a pre-existing law, back ten years into the past. Is it reasonable that the carrier must be conclusively presumed to have violated the Commerce Act when it charged established rates designated by the Commission? The carrier has every right, moral, equitable and legal, to insist that its conduct be judged by comparing it with a definite existing standard, such as an established rate, or in the absence of a definite standard, to have the lawfulness of its conduct determined by the jury.

It must be borne in mind that we are discussing damage suits—suits where the aggrieved party asks to have money taken from the defendant to make good damage incurred by reason of defendant's unlawful act.

As stated in the above quotation from the opinion in *Baer Bros. v. Denver & R. G. R. R. Co.* (233 U. S. 479, at 486), the Commission in awarding reparation is determining a private matter and measuring past injuries sustained by a private shipper. As stated in the opinion below: "When we come, however, to a reparation case, we encounter at once, not the question of making efficient the orders of the Commission as an administrative body, and of enforcing its proper control over Interstate Commerce, but the right of an individual plaintiff to recover compensation from the defendant for damages alleged to have been actually incurred by reason of such defendant's unlawful conduct. We are dealing not with governmental control over those engaged in a *quasi* public employment, but with a personal controversy, which, under our traditional institutions and constitutional system, can only be determined, as other personal controversies of the

kind are determined, by a jury trial at common law" (R. 141).

And to the same effect is the opinion in *Lehigh Valley v. Clark* (207 Fed. 717, at 723; p. 104):

"As to the provisions covering reparation cases, Congress is no longer dealing with those matters which concern the practical management and conduct of the business of carriers and the regulation thereof *in futuro*, in the interests of the public generally, but is conferring a private right of action upon those who have suffered actual damage, by reason of such carriers' violation of some requirement of the Act. The conferring of such right of action, though incident to its power to regulate commerce, is not a regulation thereof. It makes redress of a private injury actually suffered, possible."

The Commission, in 1888, called the attention of Congress to this inherent distinction between governmental control and personal controversy. Thereupon Congress amended the act to substitute trial by jury for trial by Commission.

It cannot be assumed that Congress in enacting the amendment of 1889 intended that the main issue as to lawfulness should still be tried by the Commission or that the carrier should be prejudiced at the threshold of the case by a conclusive presumption of guilt. The provisions of the amendment making the report of the Commission *prima facie* evidence only of stated facts is inconsistent with an intention to make the Commission's determination as to the carrier's conduct evidence of guilt, conclusive or otherwise.

Congress certainly has not expressed the intention that defendant's guilt or innocence shall be determined by comparison with a judicial determination by an administrative board, made long after an act is committed. Even if Congress has the power to make such

a law, no attempt has been made to exercise such power. It may well be that to preserve the efficiency of the Commerce Act the Commission's determination as to reasonableness must in all cases be deemed conclusive. There is not the slightest evidence, however, that Congress intended to make such a determination conclusive in a reparation case. If damage cases cannot be tried without imposing upon the defendant, as conclusive, an *ex post facto* edict of an administrative body, then damages should not be allowed; at least, not until Congress has affirmatively stated that the defendant's right of property shall be dealt with in that extraordinary manner. It seems more reasonable to assume that Congress would refuse to allow damages where the established rate is charged than to enforce in a suit for damages a conclusive rule of conduct not determined upon when the rate was charged. If Congress should pass a two-cent per mile passenger fare law, it would not attempt to give reparation on that basis to former travelers. No more did Congress intend that the Commission should exercise the legislative power of fixing, in 1911, rates to apply conclusively to transactions of 1907.

Section 10 of the Act provides for criminal prosecutions, heavy penalties, and in certain cases imprisonment for violating the provisions of the Act. If a carrier were indicted for charging an unreasonable rate or carrying out an unreasonable practice, the jury, under the doctrine of the *Abilene Cotton Oil Case*, could not pass upon the reasonableness of the practice or the reasonableness of the rate. That must be at first decided by the Commission. When decided it may well be that such determination by the Commission must be conclusive. But the same rule of necessity which makes the Commission's determination conclusive, makes it im-

possible to use the determination in a criminal prosecution. In other words, a carrier should not be prosecuted for failing to comply with a rule of conduct to be determined by the Commission in the future.

Congress clearly intended that the jury should decide in each case whether the carrier has violated the Act. The election of remedies which Congress attempted to give in Section 9 shows conclusively that Congress believed, when passing the Act, that the issue as to the lawfulness of the carrier's conduct was for the jury. It certainly did not have in mind that such issue was to be conclusively determined in damage cases by the Commission. If the damage suits provided for in 1889 by the amended Section 16 may not be tried by a jury but must be tried half by jury and half by the Commission, a remedy (novel and *sui generis*) results which Congress has not yet provided or even contemplated.

When, in 1888, the Commission stated to Congress that it (the Commission) deemed the provision for enforcing damage awards in equity suits unconstitutional, Congress might perhaps have taken the position that established rates were legal only by sufferance and until the Commission got around to pass upon them. Congress perhaps could have said that the carriers in collecting established rates not yet passed upon by the Commission held a part of such rates in trust, as it were, to be restored when the Commission should find time to determine the amount of overcharge, if any. But Congress did not see fit to inject such an element of uncertainty into the carriers' business. It abandoned entirely any attempt to enforce the Commission's awards and left shippers to their remedy by damage suits at common law. Congress did not provide for a suit in equity in which half of the issues were to be framed for a jury. Congress did not attempt to create a new form of action

in which the issues should be tried, half by the Commission and half by the jury. Congress provided that damages must be collected, if at all, in damage suits at common law, which shall proceed (with the exception as to certain *prima facie* evidence) in all respects like other civil suits for damages (§16 of the Act). Since the suit is not in equity and not in admiralty, it follows that the issues must be tried by jury, for the seventh amendment to the Constitution, protecting the right of trial by jury, embraces "all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights." We quote from the opinion of Mr. Justice Story, in *Parsons v. Bedford*, III. Peters 433 at 446. Mr. Justice Story there said (beginning at page 445):

"The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy. The right to such a trial, it is believed, incorporated into, and secured in every state constitution in the union; and it is found in the constitution of Louisiana. One of the strongest objections originally taken against the constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases. As soon as the constitution was adopted, this right was secured by the seventh amendment of the constitution proposed by Congress, and which received an assent of the people so general, as to establish its importance as a fundamental guarantee of the rights and liberties of the people. This amendment declares, that 'In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact once tried by a jury shall be otherwise re-

examinable in any court of the United States than according to the rules of the common law.' At this time there were no states in the union, the basis of whose jurisprudence was not essentially that of the common law in its widest meaning; and probably no states were contemplated, in which it would not exist. The phrase 'common law,' found in this clause, is used in contradistinction to equity, and admiralty, and maritime jurisprudence. The constitution has declared, in the third article, 'That the judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States and treaties made or which shall be made under their authority,' etc., and to all cases of admiralty and maritime jurisdiction. It is well known that in civil causes, in courts of equity and admiralty, juries do not intervene, and that courts of equity use the trial by jury only in extraordinary cases to inform the conscience of the court. When, therefore, we find, that the amendment requires that the right of trial by jury shall be reserved in suits at common law, the natural conclusion is that this distinction was present to the minds of the framers of the amendment. By common law, they meant what the constitution denominated in the third article 'law': not merely suits, which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those, where equitable rights alone were recognized, and equitable remedies were administered; or where, as in the admiralty, a mixture of public law and of maritime law and equity was often found in the same suit. Probably there were few, if any, states in the union, in which some new legal remedies differing from the old common law forms were not in use, but in which, however, the trial by jury intervened, and the general regulations in other

respects were according to the course of the common law. Proceedings in cases of partition and of foreign and domestic attachment, might be cited as examples variously adopted and modified. In a just sense, the amendment then may well be construed to embrace all suits, which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights."

A shipper who succeeds in a reparation case necessarily obtains a preference. It is fair to assume that a very small number of shippers who pay a rate which is thereafter reduced ever in practice receive reparation. The necessity that all shippers shall fare alike underlies the reasoning in the *Abilene Cotton Oil Case*. But the same discrimination and rebating takes place, although under a technical legalized form, as the result of a successful reparation proceeding. In the present case Mr. Meeker endeavors to recover a large sum of money, consisting of parts of tariff rates paid by him between August 1, 1901, and July 1, 1907. In a second case he is endeavoring to recover for a subsequent period. In the meantime all other shippers have been paying the tariff rates. Mr. Meeker, if he is successful in collecting his reparation, would receive a refund of tariff rates which would give him an enormous preference over his competitors. As we shall point out in connection with the Limitation Points, later discussed, it is not the policy of Congress to extend the granting of these legalized rebates.

There is the further objection to imposing upon the jury, in a damage suit, as *prima facie* or conclusive, the conclusion of the Commission as to reasonableness of a past rate or practice, namely, that such a provision if attempted by Congress would not be an exercise of the constitutional power to regulate commerce.

At the trial defendant objected on this ground to the receipt in evidence of the opinions and orders of the Commission (R. 61, 67, 70). The defendant also requested the trial Court to direct a verdict for the defendant on this ground, which request was denied, and exception taken (R. 94). The defendant requested the Court to charge as follows: "The order and findings upon which the plaintiff's case rest are invalid, because on their face they purport to regulate commerce which was completed before the time when the order was made, and which, therefore, was not subject to regulation at that time; it not being within the power of Congress to provide by legislative enactment that the Interstate Commerce Commission can make findings upon which there may be a claim for a reparation of damages to a petitioner before that body, and then provide that on the trial of a suit to recover such alleged damages the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated; the power to regulate commerce does not include the power to dispose of proceeds of past transportation transactions. The power to prescribe what shall be a reasonable charge for interstate transportation does not include the power to say what shall be done with the money collected from shippers in the past, and, therefore the verdict must be for the defendant" (R. 95).

FIFTH POINT.

The complaint in the proceeding before the Commission was filed July 17, 1907, at a time when the right of the Commission to pass upon the discrimination claims and the greater part of the excessive charge claims had expired by limitation.

At the trial the defendant objected on this ground to the receipt in evidence of the reports and orders of the Commission (R. 59-61, 68-71). The defendant also requested the Court to direct a verdict for the defendant on this ground, which request was denied and exception taken (R. 97, 98). In making said requests and objections the several limitations relied on were specified and exception taken as to each. The defendant also excepted to that part of the charge wherein the Court stated that there were no such limitations applicable to plaintiff's claim (R. 92, 94). Assignments of error in point are numbers 19, 36, 37, 38 (R. 105, 108, 109).

The questions raised under this point involve the interpretation of the limitation clauses in Section 16 of the Act, as amended June 29, 1906. These clauses are as follows: "All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the circuit court within one year from the date of the order, and not after: *Provided*, that claims accrued prior to the passage of this Act may be presented within one year" (Vol. 34, United States Statutes at Large, Part 1, p. 590).

With the exception of claims amounting with interest to \$6,211.41, all of the claims involved in this action ac-

crued prior to June 29, 1906, the date of the passage of the Hepburn Act (R. 83). The question is, what part of the claims that accrued prior to June 29, 1906, had by limitation passed beyond the jurisdiction of the Commission when Mr. Meeker's complaint before the Commission was filed, on July 17, 1907.

(a) *The jurisdiction of the Commission over Mr. Meeker's claims was limited by the two years' limitation in Section 16 of the Act.*

The learned Court below, after quoting the above provisions of Section 16, stated:

"The manifest intention of Congress here, as in all statutes of limitations, was to prevent the accumulation of claims until they were stale, and to compel those who felt themselves aggrieved by the rates exacted by interstate carriers, to use due diligence in availing themselves of the remedial provisions of the act. It surely was not the intent of the amendment passed June 29, 1906, that claims prior to that date which had accrued as far back as 1887, might be presented to the Commission, provided only they were so presented within one year after the passage of the amending act of 1906. The evident purpose of Congress was to cut off all claims for reparation more than two years old. In order, however, to prevent those whose accrued claims were two years old at the time of the passage of the amending act, from being taken by surprise and put at a disadvantage, as compared with those whose claims had accrued less than two years before the passage of the act, or with those whose claims having accrued after the passage of the act had full notice of the time within which they must be prosecuted, Congress gave a year's time within which claims accruing before the passage of the act might be presented

to the Commission. It would be a harsh construction, however, doing violence to what seems to us the evident intent of Congress, to say that, in giving this time, it did not mean to preserve the two years' limitation, both as to claims before and after the act. We conclude, therefore, that the Commission in this case had no jurisdiction to entertain a claim of the shipper accruing prior to July 17, 1905" (R. 150).

The Commission had taken the position that the two year limitation contained in Section 16 did not apply to claims accrued prior to the passage of the act, if claims were filed within one year from the effective date of the act. For this reason, the Commission allowed reparation in this case back to November, 1900, although the complaint was filed with the Commission July 17, 1907. Their views on this point are set forth in their report in the case of *Nicola, Stone & Myers v. Louisville & Nashville R. R. Co.*, XIV, I. C. R. 199, at 206.

The logical and reasonable construction of the section is, that when the Act was passed, June 29, 1906, the jurisdiction of the Commission was made to include only claims arising within two years, and the one year proviso was inserted solely for the purpose of preventing claims which accrued immediately after June 29, 1904 (two years before the passage of the act), from being outlawed because of the inability to file claims immediately after the passage of the act. In other words, those who prepared the proviso saw that a shipper whose claim antedated the taking effect of the act, would not have the opportunity, by reason of the law not having become fully promulgated and understood, to present all of his claims which had accrued within two years before the passage of the act, whereas, the shipper whose claim accrued after the act would have that advantage. It

was the intention of the law to limit everybody to two years, but the one year proviso was inserted not for the purpose of extending the right of shippers back to the organization of the Commission, or even back for five years, but for the purpose of protecting shippers against having their claims cut off because they could have no opportunity to understand the law and present their claims.

When Congress established the two year limitation its purpose was to prevent inequalities by forbidding shippers to sue upon claims long accumulated, and thereby obtain preferences. It is clear that when Congress passed the Hepburn Act, it had the power to provide that no one could recover damages. Under the doctrine of the *Abilene Cotton Oil Case* that would have been a logical thing to do. Since the recovery of any amount by a shipper is a discrimination, the recovery of such amounts through the procedure prescribed in the act might be called a judicial rebate. Although Congress might lawfully and consistently have cut off all claims for damages, it went only so far as to cut off claims more than two years old, thus abolishing many inequalities without arriving at absolute equality.

The purpose of Congress, which was to abolish inequalities, is inconsistent with the claim that Congress intended to divide shippers into two classes—those whose claims accrued prior to the Act, and those whose claims accrued subsequent to the Act; and as to shippers whose claims accrued prior to the Act, allow the inequalities to survive.

Congress had the power to abolish all discriminations, and since 1887 no shipper has had a vested right to sue for reparation (*Maryland v. B. & O.*, 3 Howard, 534; *Norris v. Crocker & Egbert*, 13 Howard, 429 at 440).

If Congress has the power to provide that the Commission may go back into the past and create a liability, it certainly has the power to say just how far back the Commission can go. The question is not one of limitation of actions, but of the extent of the jurisdiction of the Commission. Congress, in conferring jurisdiction upon the Commission could, of course, limit that jurisdiction to two years or any other reasonable period.

That it was the intention of those who framed the amendment to limit all claimants to two years, is shown by reference to the proceedings of Congress. (Congressional Record, May 11, 1906, p. 6706.) It seems that the Cattlemen's Association had claims for reparation which had been accruing. They sent Mr. Culberson a telegram asking him to insert an amendment allowing one year to file accrued claims before the Commission. Mr. Culberson thereupon proposed to extend the two years to three. Mr. Dolliver then stated: "*I think the matter could be better got at by leaving the limitation two years and adding in case of claims already accrued, an additional year.*" To meet this suggestion, Mr. Culberson stated: "I move, therefore, that the suggestion of the Senator from Iowa to add after the word 'after,' in line 22, page 13, the words: 'Provided, That accrued claims may be presented within one year,' that means one year after the passage of the act." The amendment was thereupon agreed to. In other words, the express purpose in adding the one year clause was to give claimants whose claims had accrued within two years prior to the passage of the act three years instead of two years. It is clear that those who inserted the clause intended to make three years the outside period and that a con-

struction which would open up claims for a longer period than three years would be destructive of the true intent and purpose of the amendment. As Mr. Dolliver stated: "We ought to be careful not to get it in such shape that the claimant may allow his claims to accumulate for a long time before he even complains about them and then by these actions recovers a large accumulation of damages."

If the one year proviso were held to mean that shippers might file claims which accrued prior to the Act, regardless of how long prior to the Act they accrued, then, to be consistent, all claims accruing prior to the passage of the Act must be held to have been taken, as a group, entirely out of the limitation. If this had been the intention, a clear wording of that intention would have been "This limitation shall not apply to claims accruing prior to the passage of the Act." Such a clause would not be a proviso upon the two year limitation, but would abolish the two year limitation insofar as past claims were concerned. But it has been held, both by the Commission and the courts, that such was not the intention of Congress. In *Dickerson v. Louisville & Nashville R. R. Co.* (XV, I. C. R. 170, 172; 191 Fed. 705, 711), the two years' limitation was held by the Commission and by the Court of Appeals to apply to claims that accrued prior to the passage of the Act as well as to claims accrued subsequent thereto. The claim in that case accrued December 26, 1905. It was contended that the one year proviso excluded that claim entirely from the two year limitation, and that inasmuch as petition was not filed before the Commission until September 5, 1907, the Commission had no jurisdiction. But the Commission held that the two year limitation applied as well to claims accruing before the passage of the Act as those accruing subsequent thereto, and that, therefore,

since the claim was filed within two years from the time it accrued, the Commission had jurisdiction.

For the purpose of extending its jurisdiction, the Commission has held, on the one hand in the *Meeker case* that the one year proviso eliminated all claims accruing prior to the passage of the Act from the two years' limitation, and on the other hand, has held in the *Dickerson case* that it did not do so. The Commission cannot blow both hot and cold. Its interpretation to the effect that the two years' limitation applies to claims accruing both before and after the passage of the Act, which interpretation is approved by the Court of Appeals in the *Dickerson case* and the *Meeker case*, seems to be the correct and logical interpretation of the statute. It gives the proviso its true meaning, namely, that of a qualification, rather than a destruction of the two years' limitation. It is clear that the interpretation of the Commission, as approved in the *Dickerson case*, is absolutely inconsistent with the contention that the one year proviso has excluded from the two year limitation all claims accruing prior to the passage of the Act.

In the foregoing discussion it has been assumed, without admitting, that Mr. Meeker's claim was filed within the one year period. We further submit that:

(b) *Inasmuch as the claim was not filed within one year from the passage of the Act, the Commission had no jurisdiction over any claim accruing more than two years prior to the filing of the complaint. That is to say, the Commission had no jurisdiction over any claims accrued prior to July 17, 1905.*

The passage of the Act was June 29, 1906. Meeker & Co.'s complaint was not filed until July 17, 1907. The Commission, however, assumed jurisdiction over all of Mr. Meeker's claims on the theory that the words "pas-

sage of this Act" referred not to the date of the passage of the Act (June 29, 1906), but to a later date, namely, August 28, 1906. The Hepburn Act was passed and approved by the President on June 29, 1906. It became a law upon that date (Vol. 34, United States Statutes at Large, Part I, p. 595). On the next day the following resolution was passed:

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act entitled 'An Act to amend an Act entitled "An Act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, and all Acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission,' shall take effect and be in force sixty days after its approval by the President of the United States. Approved, June 30, 1906."

(Vol. 34, United States Statutes at Large, Part I, p. 838.)

The Commission interpreted the proviso in Section 16 in connection with the resolution of June 30, 1906, in such a way as to extend the jurisdiction of the Commission to claims accruing prior to August 28, 1906, provided such claims were filed prior to August 28, 1907. The views of the Commission upon the point are stated in the case of *Nicola, Stone & Myers Co. v. L. & N. R. R. Co.*, XIV. I. C. R. 206. As its conclusion the Commission stated: "Viewing together the Hepburn Act, approved June 29, 1906, and the joint resolution relating thereto, approved on the succeeding day, it is our conclusion that the legislative intent was to make the effective date of his act the date from which it speaks for all purposes—August 28, 1906."

As this question could not properly arise until a belated claimant filed a claim subsequent to June 29, 1907,

the ruling was made by the Commission after its jurisdiction had been limited by the expiration of one year from the passage of the Act. The interpretation, therefore, is merely an attempt by an administrative body with restricted powers, to extend its jurisdiction over matters not within its jurisdiction.

The same matter was referred to by the Commission but not fully discussed, in the following decisions: *Goff-Kirby Coal Company v. Railroad*, XIII. I. C. R. 383, at 386; *Missouri & Kansas Shippers' Association v. Railway*, XIII. I. C. R. 411; *Kile & Morgan v. Railway*, XV. I. C. R. 235, at 237; *Woodward & Dickerson v. Railroad Co.*, XVII. I. C. R. 9, at p. 10.

The Commission's interpretation has not received the approval of the courts. In *Louisville & Nashville v. Dickerson* (191 Fed. 705, at 711) the Circuit Court of Appeals of the Sixth Circuit, referred to the limitations in Section 16 as follows: "The Commission held the original communication a sufficient complaint (15 Interst. Com. Com'n R. 170, 172), and we think correctly. It was sufficient to inform the defendant of plaintiff's grievance. Formality was not required. In passing upon the question of the statute of limitations the Commission followed its ruling in *Nicola, Stone & Myers Co. v. L. & N. R. Co.*, 14 Interst. Com. Com'n R. 199, 206, where it was held that any claim accruing before or after August 28, 1906, may be presented within two years from the time it accrued, and that claims accruing before August 28, 1906, may be presented within one year from that date, even though accruing more than two years previous to the date named. *Woodward & Dickerson v. L. & N. R. R. Co.*, 15 Interst. Com. Com'n R. 170, 172; same case on rehearing, 17 Interst. Com. Com'n R. 9. We think this the correct construction of

the statute, and that the claim was accordingly not barred."

The claim involved in the *Dickerson case* accrued December 26, 1905. Complaint was filed before the Commission September 5, 1907. The claim was, therefore, filed over a year after the passage of the Act and also over a year after the effective date stated in the resolution of June 30, 1906. The limitation question involved in the *Dickerson case* was as to whether or not the claim accruing prior to the passage of the Act might be filed within two years from the date the claim accrued, although filed more than one year after the passage of the Act. The Circuit Court of Appeals approved the Commission's ruling to the effect that all claims, whether accruing before or after the Act, might be filed within two years from the time they accrued. The Circuit Court of Appeals did not pass upon and could not pass upon, in that case, the date when the one year period, in the proviso, expired.

If words are to be given their natural meaning, there can be no force to the Commission's interpretation of the proviso. The words are: "*Provided*, That claims accrued prior to the passage of the Act may be presented within one year." As we shall point out, Senator Culberson, who first introduced the proviso, stated, after reading it: "*That means one year after the passage of this Act.*" It was a case of good plain English.

That Congress meant that the one year period should expire at the close of one year after the passage of the act is clearly shown by reference to the proceedings in the Senate when the proviso was first proposed by way of an amendment to Section 16. We quote from the Congressional Record (under the authority of *Blake v. National Banks*, 23 Wallace, 307, and *Church of the Holy Trinity v. U. S.*, 143 U. S. 457 at 464):

Senate, May 11, 1906. (Congressional Record, p. 6,700.)

"The Secretary resumed and concluded the reading of Section 5, as follows:

Sec. 5. That Section 16 of said Act as amended March 2, 1889, be amended so as to read as follows:

"Section 16. * * * All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the circuit court within one year from the date of the order and not after. * * *"

Senate, May 12, 1906. (Congressional Record, p. 6,788.)

"The Vice-President: The amendment proposed by the Senator from Texas will be stated by the Secretary.

"The Secretary: On page 13, line 18, before the word 'years,' it is proposed to strike out the word 'two' and insert 'three,' so as to read:

"All complaints for the recovery of damages shall be filed with the Commission within three years from the time the cause of action accrues, and not after.

"Mr. Culberson: Mr. President, just a word in explanation. This paragraph is a mere statute of limitations, as I take it, and yesterday I received a telegram from the attorney of the Cattlemen's Association, which read as follows, after the date and direction:

"Cattlemen's claims for reparation have been accruing; three (*sic*) years limitation clause by Hepburn Bill possibly bars prior to two years; insert amendment allowing one year to file accrued claims before Commission.

S. H. Cowan.

"It seems to me that that statement is sufficient reason for the Senate to adopt this more favorable amendment extending the time one year in which accrued claims may be presented. * * *

"Mr. Dolliver: That section refers to claims for damages on account of overcharges. I think we ought to be careful not to get it in such shape that the claimant may allow his claims to accumulate for a long time before he even complains about them, and then by these actions recover a large accumulation of damages. I think the matter could be better got at by leaving the limitation two years and adding 'in case of claims already accrued, an additional year.' It certainly would not be a good thing to allow a man to wait three years before even complaining about the overcharge and then be entitled to recover for the entire three years.

"Mr. Culberson: I think the suggestion of the Senator simply accomplishes the matter in another way. I have no objection to it. I move, therefore, that the suggestion of the Senator from Iowa to add after the word 'after,' in line 22, page 13, the words:

Provided, That accrued claims may be presented within one year.

"*That means one year after the passage of this Act.*

"The Vice-President: The question is on agreeing to the amendment proposed by the Senator from Texas.

"The amendment was agreed to."

The Hepburn Act was in any event effective from June 29th to June 30th, 1906. On this point Judge Landis stated, in his opinion in the case of *United States v. Standard Oil Company*, 148 Fed. 719, at 722:

"It is contended in behalf of the United States that the Act of June 29, 1906, did not go into effect until after these indictments were returned. The pertinency

of this proposition will appear hereafter. It is urged that this postponement was effected by the adoption of the joint resolution by Congress, approved June 30, 1906. That resolution provides that the rate law 'shall take effect and be in force sixty days after its approval by the President of the United States.' Of course, the purpose of this resolution is obvious. But it was wholly ineffective until approved by the President. This occurred on June 30th. And by its own terms the Act became effective upon its approval by the President one day before. Plainly, therefore, on June 30th, the resolution was powerless to postpone that which had already occurred on June 29th. While possibly on June 30th, the resolution might operate to suspend the Act for a period of time (and as to this I express no opinion), the question presented by the demurrs to these indictments are to be determined as if a postponement or suspension of the Act had not been attempted."

The subsequent resolution of June 30, 1906, did not have the effect of repealing the Act, nor did it attempt to state that the date of the passage of the Act should be postponed. To so interpret the resolution is to raise a serious question of its validity. As Mr. Drinker stated in his book on Interstate Commerce (p. 439), "There would seem to be some doubt as to the power of Congress to change the date of the 'passage of the Act,' merely by suspending its operation. It might well be that when the President signed the Act the date of its passage was unalterably fixed."

A reasonable interpretation of the resolution of June 30, 1906, is that from and after the passage of the resolution of June 30th, 1906, the Hepburn Act had exactly the same effect as if the last paragraph of the Hepburn Act had read as follows: This Act shall take effect and be in force from and after the expiration of sixty days

after its passage. That such was the intention, is shown by reference to the proceedings of Congress:

Senate, June 28, 1906. (Congressional Record, p. 9,522.)

"Mr. Tillman: It will be recalled that when we presented the first conference report we had incorporated a provision extending for sixty days the time when the rate law should go into effect. By some strange oversight the Senate had appeared to forget that this complicated machinery could not be put in running order immediately, and conferees provided that it should not take effect until sixty days. But we got such a * * * lambasting here, because we had presumed to put something in which was not in order that we did not feel willing to try that any more. It will be absolutely necessary that the joint resolution which I send to the desk shall be considered and passed immediately, and I ask unanimous consent for its present consideration."

At the close of the amendment of June 18, 1910, it is provided "That this Act shall take effect and be in force from and after the expiration of sixty days after its passage, except as to Sections 12 and 16, which sections shall take effect and be in force immediately" (Sections 12 and 16 are sections of the 1910 Act and not sections of the Interstate Commerce Act).

Section 24 of the original Act of 1887 provided "That the provisions of Sections 11 and 18 of this Act relating to the appointment and organization of the Commission herein provided for shall take effect immediately and the remaining provisions of this Act shall take effect sixty days after its passage."

If the Hepburn Act, which contained in Section 16 the words, "Provided that claims accrued prior to the passage of this Act may be presented within one year" had also contained a provision (as did the Act of June

18, 1910) to the effect that "this Act shall take effect and be in force from and after the expiration of sixty days after its passage," it could not have been contended that the word "passage" in one instance meant the effective date and in the other instance the day the President signed the Act.

As shown by the proceedings of Congress quoted above, the resolution approved June 30, 1906, providing that the Act "shall take effect and be in force sixty days after its approval" was passed because those words had been omitted from the Act of June 29th, through an oversight. If the words, "Shall take effect and be in force sixty days after its approval" had been a part of the Act of June 29th, it could not be contended that the word "passage" in Section 16 referred to the effective date.

The purpose of the one year proviso was to allow a reasonable time within which to present claims which had accrued prior to the passage of the Act. It was a matter of notice and not a matter of prohibition or compulsory action. Congress intended to state a reasonable time within which to present claims after shippers had notice of the requirement that they do so. The passage of the Act gave this notice. Its effective date did not give this notice. The effective date could not give the notice because it had already been given, and the law will presume that everybody knew of the passage of the Act the day after it was passed. One year from the date of the notice was certainly ample time within which to file claims. There is no reason for supposing that Congress intended to give a notice of one year plus sixty days.

It would have been entirely proper for the period within which claims could be presented to have been fixed with reference to a definite date, say July 1, 1907. The specified date has no connection with the continuing

operation of the Act. On June 29th, 1906, shippers were notified that a certain class of claims must be filed with the Commission, if at all, prior to June 29th, 1907. The passage of the Act gave shippers that notice as a matter of law, and that notice was never changed or withdrawn. Even if the extreme interpretation of the resolution of June 30th, 1906, could be sustained to the effect that until August 28th, 1906, the Act must be considered as non-existent, the fact remains that when the Act came to life again, on August 28, 1906, it had in it, the provision that claims should be filed within one year from the passage of the Act, and the passage of the Act was June 29, 1906. But, of course, the plain intent of the resolution was that the Act should remain existent as notice to all concerned, that in sixty days certain requirements and conditions must be met.

The one year proviso constituted a postponement in the same manner that the sixty day resolution constituted a postponement, the only difference being that the one year clause in substance postponed the effective date of a single provision, while the sixty day clause postpones the effective date of all other provisions for sixty days. The sixty days' postponement was to allow time within which the "complicated machinery could be put in running order." There was no such reason for extending the one year notice to one year and sixty days.

Even conceding that the Court might construe the word "passage" to mean "effective date" for the purpose of making a provision of the Act effective, no such violence against language is necessary or proper in this case. The clear intent of Congress was to place in section 16 a provision that certain claims must be filed within a year from the passage of the Act. As Senator Culberson stated, "*That means one year after the passage of this*

Act." Congress further intended to place at the end of the Act a provision that it should become effective within sixty days from its passage. If the intent of Congress as clearly expressed in the Act and in the resolution is to be carried out, the one year period ended June 30, 1907.

(c) *The complaint before the Commission was filed July 17, 1907. At that time all claims accruing prior to July 17, 1902, had been outlawed by Section 1047 of the Revised Statutes, which provides a five year limitation.*

The effect of this limitation will be argued in connection with its application to the commencement of this action. We now call attention to the limitation, for the purpose of showing the extreme to which the Commission went in opening the door to a recovery, which would give Mr. Meeker an enormous preference.

SIXTH POINT.

This action was commenced on September 3, 1912, at a time when the plaintiff was barred by limitation from bringing an action upon any of his claims.

At the trial, defendant objected on this ground to the receipt in evidence of the reports and orders of the Commission (R. 59, 60, 69, 71). The defendant also requested the court to direct a verdict for the defendant upon this ground, which request was denied and exception taken (R. 96-98). In making the objections and requests the separate statutes of limitation relied on were specified and exception taken as to each. At

the close of his charge the Trial Court instructed the jury as follows: "Now, Gentlemen of the Jury, the question of the Statute of Limitations has been raised here, but I instruct you that you will have nothing to do with the question of the Statute of Limitations. The matter of its application is not a matter of fact, but it is a matter of law to be considered by the Court, and, for the present, the Court instructs you that there is no Statute of Limitations which bars the recovery of the plaintiff for either of the amounts presented in this suit, and that, if you take the evidence which is made *prima facie* by the Act of Congress as conclusive of the claim, it will be your duty to render a verdict in favor of the plaintiff for the full amount for both" (R. 92). To this part of the Charge exception was taken (R. 94). The assignments of error in point are Nos. 19, 35, 39 (R. 105, 108, 109).

(a) *Limitations in bar of the discrimination claim (November 1, 1900-August 1, 1901):*

The plaintiff's entire claim for discrimination expired by limitation on or before August 1, 1906, or five years after the cause of action accrued. The claims are barred by Section 1047 of the United States Revised Statutes. This section provides as follows:

"No suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States, shall be maintained, except in cases where it is otherwise specially provided, unless the same is commenced within five years from the time when the penalty or forfeiture accrued; Provided, That the person of the offender, or the property liable for such penalty or forfeiture, shall, within the same period, be found within the United States; so that the proper pro-

cess therefor may be instituted and served against such person or property."

This Court held in the case of *Parsons v. Railway*, 167 U. S. 447, at page 455: "His (a shipper's) cause of action is based entirely on a statute, and to enforce what is in its nature a penalty. Suppose that the officials of the defendant company had charged the plaintiff only a reasonable rate for his personal transportation from his home in Iowa to Chicago, and at the same time had, without any just occasion therefor, given to his neighbor across the street, free transportation, thus being guilty of an act of favoritism and partiality—an act which tended to diminish the receipts of the railroad company, and to that extent the dividends to its stockholders—such partiality on their part would not, in the absence of a statute, have entitled the plaintiff to maintain an action for the recovery of the fare which he had paid, and thus to reduce still further the dividends to the stockholders. So, but for the provisions of the Interstate Commerce Act, the plaintiff could not recover on account of his shipments to Chicago, if only a reasonable rate was charged therefor, no matter though it appeared that through any misconduct or partiality on the part of the railway officials shippers in Nebraska had been given a less rate. It was, among other reasons, in order to avoid the public injury which had sprung from such conduct on the part of railway officials that the Interstate Commerce Act was passed, and violations of its provisions were subjected to penalties of one kind or another. But it is familiar law that one who is seeking to recover a penalty is bound by the rule of strict proof. Before, therefore, the plaintiff can recover of this defendant for alleged violations of the Interstate Commerce Act he must make a case

showing not by way of inference but clearly and directly such violations. No violation of statute is to be presumed."

The point was passed upon by the Circuit Court of Appeals, Fifth Circuit, in the case of *Carter v. New Orleans & N. E. R. Co.* (143 Fed. 99). The action was for damages for discrimination under the Act to Regulate Commerce. The Court held that Section 1047 of the Revised Statutes (which is quoted above) applied to that action. The claim in that case was, that Section 2741 of the Mississippi Code barred the claims after the expiration of one year. The Court, however, held that although the Mississippi Statute might apply in the absence of any provision by Congress, that the State Statute could not apply because Section 1047 of the Revised Statutes covered the case. The Court said at page 100: "Conceding that, in the absence of any provision of the Act of Congress creating a liability fixing a limitation of time for commencing actions to enforce it, the statute of limitations of a particular state wherein the action is brought is applicable (*McClaine v. Rankin*, 179 U. S. 158, 25 Sup. Ct. 410, 49 L. Ed. 702), we do not think that Section 2741 of the Mississippi Code applies in the present case. If the action is remedial only—that is to recover statutory damages—the terms of that section exclude its application. If the action is one for a forfeiture or penalty, and the Act creating the liability fixed no limit of time for commencing the action to recover the penalty, then Section 1047 of the Revised Statutes of the United States seems to cover the case."

Section 344 of the Federal Penal Code of 1910, leaves unchanged the limitations contained in Section 1047 of the Revised Statutes.

(b) *Limitations in bar of the excessive charge claims*
(August 1, 1901—July 1, 1907):

Section 1047 of the Revised Statutes, limiting actions to five years from the time that the penalty accrued, applies in bar of plaintiff's entire claim for excessive charges as well as to plaintiff's discrimination claim. This action having been commenced on September 3, 1912, all claims arising prior to September 3, 1907, were barred. The latest claim in suit arose July 2, 1907 (R. 89, 191).

Although in the case of *Parsons v. Railway*, quoted above (167 U. S. 447) the claim was based upon a discrimination, the reasoning of the *Parsons case* applies equally to an action to recover under the act, for excessive charges. Plaintiff's claim is based upon the Statute and is to recover for a violation of that part of the Statute which prohibits the charging of unreasonable rates.

If it should be held that the five year limitation in Section 1047 of the Revised Statutes does not apply, then plaintiff's claim is barred (with the exception of \$3,853.30 and interest) by the six years' limitation under the Pennsylvania Statute. Excepting claims amounting to \$3,853.30, all the claims arose prior to September 3, 1906, and therefore more than six years prior to the date that this action was commenced (R. 83). The Pennsylvania Statute is as follows:

"All actions of the trespass *quare clausum fregit*, all actions of detinue, trover and replevin for taking away goods and cattle, all actions upon account, and upon the case, other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants, all actions of debt, grounded upon any lending or contract, without specialty, all actions of debt

for arrearages of rent, except the proprietaries' quit-rent, and all actions of trespass, of assault, menace, battery, wounding and imprisonment, or any of them, which shall be sued or brought at any time after the 25th day of April, which shall be in the year of our Lord 1713, shall be commenced and sued within the time and limitation hereafter expressed, and not after; that is to say, the said actions upon the case, other than for slander, and the said actions for account, and the said actions for trespass, debt, detinue and replevin, for goods or cattle, and the said actions of trespass *quare clausum fregit*, within * * * six years next after the cause of such actions or suit, and not after. And the said actions of trespass, of assault, menace, battery, wounding, imprisonment, or any of them, within * * * two years next after the cause of such actions or suit, and not after. And the said actions upon the case for words, within * * * one year next after the words spoken, and not after (Stewart's Purdon's Digest, 13th Ed., Vol. 2, p. 2282).

Section 721 of the Revised Statutes provides as follows: "The laws of the several States, except where the constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decisions in trials at common law, in the courts of the United States in cases where they apply." If, therefore, it should be held that plaintiff's claim, based on the alleged excessive charges, is not a claim for a penalty under the statute and therefore not controlled by Section 1047 of the Revised Statutes, the Pennsylvania six-years'-statute would apply.

When Mr. Judson wrote his treatise on the Interstate Commerce Law (first published in 1905), the two year limitation now contained in Section 16 was not a part of the act. Mr. Judson stated as to limitations under

the act before it was amended in 1906: "This question, however, of the application of the statute of limitations to such claims has not been judicially determined. It would seem from analogy to the application of the statute in suits brought by shippers under Sections 8 and 9 (see *supra*), that the limitation statute as to such rights of action, in the states where the claim is sought to be enforced, should control, and the beginning of the suit to enforce the individual claimant's rights to reparation should be the beginning of the action within the meaning of such statute."

We can find no authority for the proposition that the beginning of a proceeding before the Commission, constitutes a beginning of the action at law for damages. In fact, the contrary has always been assumed. The effect of the proceeding before the Commission is solely to furnish the claimant evidence to prove his case. In *Baer Brothers Mercantile Company v. Denver & Rio Grande Railroad Company* (200 Fed. 614) the District Court held that the suit is an independent judicial proceeding and not an execution of the orders of the Commission. The Court stated at page 616: "Upon questions of fact it is true the finding of the Commission is, under Section 5 of the Act of June 29, 1906, *prima facie* evidence of the facts at the trial of the cause, but this is a mere matter of evidence and has no relation to the pleadings." In *Jacoby v. Pennsylvania Railroad Company* (200 Fed. 989, at 996) District Judge Thompson stated: "As said by Judge Lanning in the *Morrisdale Case*, the procedure of the Commission in making the assessment constitutes no part of a judicial proceeding." The quotation referred to is from the decision in *Morrisdale Coal Company v. Pennsylvania Railroad Company*, (183 Fed. 929, at 937): "As already suggested, the letter of the statute seems to confer upon the Commission the

power to assess damages in every case of discriminatory practices. Its procedure in making the assessment constitutes no part of a judicial proceeding. In a court of law its findings and order are but *prima facie* evidence of the damages sustained." (Affirmed without discussion of this point, 230 U. S., 304.)

In *Western New York & P. R. Co. v. Penn Refining Co.* (137 Fed. 343, at 354) it is stated that the action is, in a qualified sense, independent of the investigation by the Commission, and again at page 349: "The Commission, although clothed with quasi judicial functions, is an administrative body in contradistinction to a judicial tribunal. * * * No 'lawful order or requirement' of the Commission, referred to in Section 16 * * * executes itself. Should the carrier or carriers to whom it is directed not voluntarily obey it, it can be enforced only through judicial proceedings as provided for in that section."

In *Interstate Commerce Commission v. Cincinnati, P. & V. R. R. Co.* (124 Fed. 624, at 630) the Court referred to the suit as "an original, independent responsibility to due inquiry make, exercise its own judgment, and decide causes as they arise or are instituted."

In *Kentucky & Indiana Bridge Co. v. Louisville & N. R. Co.*, 37 Fed. 567, at 613, the Court said: "We are also clearly of the opinion, that this court is not made by the act the mere executioner of the Commissioner's order or recommendation, so as to impose upon the court a non-judicial power." And at 614: "The suit in this court is, under the provisions of the act, an original and independent proceeding, in which the Commission's report is made *prima facie* evidence of the matters or facts therein stated."

The doctrine of these cases clearly is that he who seeks damages for a violation of the Act to Regulate Commerce must sue as any other suitor in a court of

law. This is entirely consistent with the opinions of this Court in the recent cases of *Penn. R. R. v. International Coal Co.* (230 U. S., 184); *Mitchell Coal Co. v. R. R.* (230 U. S., 247), and *Morrisdale Coal Co. v. R. R.* (230 U. S., 304). The action is the same as any other action for damages and the rules applicable to the action are the same as those applicable to the ordinary action for damages.

If Meeker & Company had acted promptly instead of waiting to gather up an enormous claim or legalized rebate, there would have been ample time to get *prima facie* evidence from the Commission and sue within the periods of State or Federal limitations. There is no reason or justice in tolling the statutes, to facilitate an enormous accumulation of damages.

SEVENTH POINT.

The allowances for counsel fees are invalid and excessive.

Exceptions were taken to the granting of these fees (R. 99). The allowance of these fees is assigned as error (R. 110).

The trial Court relied in granting the allowances upon the following clause in section 16 of the Act: "Such suit in the circuit court of the United States shall proceed in all respects like other civil suits for damages except that on the trial of such suit the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the circuit court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee to be taxed and collected as part of the costs of the suit."

The Court ordered "That counsel for plaintiff be allowed a counsel fee of Ten Thousand (\$10,000) Dollars for their services in the proceedings before the Interstate Commerce Commission, and a further fee of Ten Thousand (\$10,000) Dollars for their services in the proceedings in this court" (R. 99).

It was error to allow the counsel fee of \$10,000 for services in the proceeding before the Commission, for the reason that the act provides for no such allowance. The act provides that the *petitioner* shall, if he prevail, be allowed a reasonable attorney's fee, to be taxed and collected *as a part of the costs of the suit*. There is no reference to the proceedings before the Commission.

It has been repeatedly held that the proceedings before the Commission are entirely independent of the action, that the action is not a continuation of the proceedings before the Commission, but is an independent legal proceeding. *Baer Bros. Mercantile Co. v. Denver & R. G. R. Co.*, 200 Fed. 614, at 617; *Ky. & I. Bridge v. Louisville & Nash.*, 37 Fed. 567, at 613; *I. C. C. v. Cincinnati, P. & V. R. Co.*, 124 Fed. 630.

Section 8 does not provide for counsel fees for services before the Commission. It refers to fees fixed by Court in case of recovery in court and as a part of the court costs. Pay for services before the Commission if awarded in court as a part of the damages would not be a part of the costs. The word costs in connection with a lawsuit has a definite, established meaning. It refers to "the expenses incurred by the parties in the prosecution or defence of a suit at law" (*Bouvier Law Dictionary*, Vol. I, p. 370). Costs will not be granted unless specifically provided for by statute. They are not granted as a common law right.

Coggell vs. Lawrence, 6 Fed. Cases, 2957.
Equitable Life Assurance Soc. vs. Hughes,
125 N. Y., 106.

"Statutes which give costs are not to be extended beyond the letter, but are to be construed strictly" (*Bouvier Law Dictionary*, Vol. I, p. 374).

The allowance of \$10,000 counsel fees for services in the action is excessive. As compensation for services rendered it is grotesque. As a penalty it is entirely unwarranted by law or by the circumstances of the case. As the statute limits the allowance to "a reasonable attorney's fee," the amount of the fee must be measured by the services performed. The application was made before the trial Court upon the minutes. The only evidence before the trial Court as to what would be a reasonable fee is contained within the covers of the record in the case. No affidavit was submitted in support of the request for an allowance. Plaintiff's counsel elected to rely upon whatever evidence there was in the record of the amount and value of his services. The statute purports to furnish the petitioner with a cheap and simple method of proving his case. Plaintiff's counsel relied exclusively upon that cheap and simple method. He introduced the opinions and orders of the Commission and rested. We submit that the trial Judge in allowing a fee of \$10,000 acted beyond his discretion, and that the allowance should be reduced to a small fraction of that amount.

The provision of the act permitting the allowance of an attorney's fee is unconstitutional, within the authority of *Gulf, Colorado & Santa Fe Ry. Co. v. Ellis*, 165 U. S. 150. In that case a Texas statute was declared void because it allowed an attorney fee of \$10. The act provided that if the Railroad refused to settle a claim

and the claimant finally recovered there might be added to the costs of the suit reasonable attorney's fees. The Supreme Court held that the statute arbitrarily singled out one class of debtors and punished it for a failure to pay its debts. It was, therefore, declared void. The Court stated at page 159: "But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this." And again, at page 160: "No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government." The *Ellis case* was distinguished in *Atchison, Topeka & Santa Fe R. R. v. Matthews* (174 U. S. 96). In the *Matthews case* the Supreme Court held valid an act of Kansas which allowed an attorney's fee to a plaintiff recovering from a Railroad damages on account of fire. The distinction between the *Ellis case* and the *Matthews case* is clearly stated at page 98. The purpose of the statute in the *Ellis case* was conceded to be to compel the payment of debts. The purpose of the statute in the *Matthews case* was to promote the public interest by compelling railroads to operate their trains with the utmost precaution. These two cases are cited in a long line of decisions. The principle is simple, but its application has been difficult. As to the railroad cases, however, we think it can be stated concisely and accurately, that where the statute imposing the attorney fee has for its object, not the enforcement of a debt, but an improvement in the performance of a public service, the statute is valid. If, on the other hand, the sole purpose of the statute is to compel the payment of the amount involved, it is invalid. The distinction is clearly pointed out in *Seaboard Air Line v. Seegers* (207 U. S. 73). In this case a South Carolina statute, allowing an attorney's fee

after collection by suit of claims against a railroad, was sustained. The Court said, at page 78: "It must be remembered that the purpose of this legislation is not primarily to enforce the collection of debts, but to compel the performance of duties which the carrier assumes when it enters upon the discharge of its public functions."

If valid, the allowance must be construed as a penalty to enforce the performance by the carrier of its duty. A statute granting a penalty must be strictly construed and not extended beyond its letter.

It seems clear that the effect of the clause as to attorney's fees and costs in section 16 is to penalize the carrier that insists upon its right to a trial by a jury. The award by the Commission having been made, the remaining question is, shall the carrier voluntarily pay the award or shall it insist upon this right of a trial by jury. There certainly is no public interest involved in compelling a carrier to pay these awards by waiving its right to a jury trial. For the most part the awards amount to legalized preference, and it cannot be to the interest of the public to facilitate their collection. The effect of the provision is, that Congress has attempted in one clause to make its act valid by saving the right of trial by jury, and in a succeeding clause has penalized the carrier who seeks to take advantage of this right.

In any event, petitioner is not entitled to an attorney's fee unless he is sustained in his recovery in the entire amount (*Seaboard Air Line v. Seegers*, 207 U. S. 73, at 77).

EDGAR H. BOLES,
Solicitor for Respondent.

JOHN G. JOHNSON,
FRANK H. PLATT,
GEORGE W. FIELD,
Counsel.

APPENDIX.

LEHIGH VALLEY R. CO. *et al.* v. CLARK, *et al.*

(Circuit Court of Appeals, Third Circuit, August 25, 1913.) (207 Fed. Rep. 717.)

In Error to the District Court of the United States for the Eastern District of Pennsylvania; James B. Holland, Judge.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

GRAY, Circuit Judge. In the court below, suit was brought by the defendants in error (hereinafter called the plaintiffs) against the plaintiffs in error (hereinafter called the defendant companies) under authority of the Act of Congress of February 4, 1887, amended by the Acts of March 2, 1889, and of June 29, 1906 (see 24 Stat. c. 104, 25 Stat. c. 382, and 34 Stat. c. 3591), to recover damages from the defendant companies, alleged to have been awarded by way of reparation to the plaintiffs, in certain proceedings had before the Interstate Commerce Commission.

As authorized by section 13 of said Act, the plaintiffs, on April 4, 1908, applied by petition to the said Commission, complaining that defendant companies, during certain named years, had exacted and collected from the plaintiffs the rate of \$2.00 per gross ton for the transportation of pyrites cinder, by rail from Buffalo, New York, to points of destination in Pennsylvania and New Jersey. The plaintiffs, as petitioners as aforesaid, attacked the rate of \$2.00 per gross ton on pyrites cinder, as excessive, unjust, unreasonable, and unduly discriminatory, and therefore in violation of the said Act and the Acts amendatory thereof, and prayed that the de-

fendant companies be ordered to desist from exacting and collecting such unreasonable rate; that a lower rate be put in effect, and that reparation be granted to the petitioners. The defendant companies, having been served with a copy of said complaint, made answer thereto; issue was joined, and the cause regularly heard and argued by the parties. Thereafter, January 5, 1909, as alleged in the petition of plaintiffs in the court below, the Interstate Commerce Commission made a finding and report, which was duly filed, ordering the said \$2.00 rate on pyrites cinder to be reduced to a rate not exceeding \$1.45 per gross ton for the carriage thereinbefore named, but refused to award reparation to the plaintiffs; a certified copy of which finding, with the order of the Commission, is attached and made part of the petition and statement of claim of the plaintiffs. It is then alleged by plaintiffs that the defendant companies duly complied with this order of the Interstate Commerce Commission, and on or before February 25, 1909, established, and put in effect, and now have in effect, the aforesaid reduced transportation rate. It is further alleged that on May 9, 1909, the plaintiffs duly filed with the Interstate Commerce Commission a motion for a rehearing on the question of reparation alone, which motion was granted, and notice of the granting of the same given to all parties, who appeared at the taking of additional testimony by the plaintiffs; that after hearing and argument, the Interstate Commerce Commission, on June 2, 1910, made a finding and ordered the defendant companies to make reparation to the petitioners, specifying the amount to be refunded in each case, a certified copy of the report, conclusions, and order of the Commission on the rehearing being attached as an exhibit to the petition and statement of plaintiffs in the court below. The plaintiffs aver

that a true copy of the aforesaid order of the Commission, dated June 2, 1910, was duly served upon the defendant companies, and demand made that they should pay to the petitioners the sum claimed in their petition and set forth in the aforesaid order of the Commission, but that said defendant companies have wholly failed, neglected, and refused to pay the same, etc.

Upon the facts thus alleged, the plaintiffs aver in their petition and statement of claim in the court below, that they are lawfully and legally entitled to receive and recover from the said defendant companies the several amounts of money set forth, as and for damages and reparation, in accordance with the said order of the Interstate Commerce Commission, dated June 2, 1910.

Section 14 of the original Interstate Commerce Act provided that in an investigation made by the Commission, it shall be its duty to make a report in writing, which shall include the findings of fact upon which the conclusions of the Commission are based, together with its recommendation as to what reparation, if any, should be made to the parties found to have been injured, "and such findings so made shall thereafter, in all judicial proceedings, be deemed *prima facie* evidence as to each and every fact found." Section 16 provided for the refusal or neglect "to obey * * * any lawful order or requirement of the Commission," by authorizing the Commission and the party interested in such order or requirement, to apply in a summary way to a Circuit Court of the United States *sitting in equity*, and empowering such court, as a court of equity, to hear and determine the matter, on notice to the common carrier complained of, "in such manner as to do justice in the premises," with full power to conduct all such inquiries as the court may think needful to enable it to form a just judgment in the matter, "and on such hearing * * * the re-

port of said Commission shall be *prima facie* evidence of the matters therein stated." And it is provided that, if it be made to appear to the court "that the *lawful order or requirement* of said Commission, drawn in question, has been violated or disobeyed," the court may issue a "writ of injunction or other proper process, mandatory or otherwise," to restrain the common carrier from further violation or disobedience of the order or requirement of the Commission, and enjoining obedience to the same, with power to issue writs of attachment or other process incident or applicable to writs of injunction or other proper process, mandatory or otherwise, against such common carrier. (The italics here, as elsewhere, are ours.)

It seems clear from these sections of the Act of 1887, as they originally stood, that Congress had not contemplated a distinction between reparation cases and other cases in which the order of the Commission was not complied with. Circuit Courts were vested with jurisdiction to entertain the complaint of a person interested, that an order had not been complied with, and to hear and determine the matter as courts of equity, giving the redress peculiarly appropriate to equitable jurisdiction, and for that purpose, all the findings of fact by the Commission, as well as all the evidence taken before the Commission, as set forth in the record, were before the court. As all the proceedings for the enforcement of the legal orders of the Commission were solely in equity, a difficulty was soon recognized in reparation cases. It is one thing to enforce by injunction or mandatory process the lawful ministerial order of the Commission, as to things to be done or not to be done in futuro by defendant carriers in the conduct of their business, and quite another thing to enforce an order for the payment of damages by such carriers for a past vio-

lation of law. The claim for such damages, as said by the Commission in Heck & Petree v. Railroad Co., 1 Interst. Com. Com'n R. 775, "presents a case at common law in which the defendants are entitled to a jury trial," under the seventh amendment to the Constitution. As the statute provided for no trial by jury in the suits to enforce such awards, the Commission repeatedly held that it could make no award of damages in such case, for the reason that the defendants were entitled to have the amount assessed by a jury.

This state of things undoubtedly brought about the amendment to section 16 of the original Act, by the Act of March 2, 1889. By this amendment, Congress recognized the propriety of the suggestion made by the Commission, and added to section 16 of the original Act, the following:

"If the matters involved in any such order or requirement of said Commission are founded upon a controversy requiring a trial by jury, as provided by the seventh amendment to the Constitution of the United States, and any such common carrier shall violate or refuse or neglect to obey or perform the same, after notice, * * * it shall be lawful for any company or person interested in such order or requirement to apply in a summary way by petition to the Circuit Court of the United States sitting as a court of law * * * alleging such violation or disobedience as the case may be; and said court shall by its order then fix a time and place for the trial of said cause. * * * And it shall be the duty of the marshal of the district * * * to forthwith serve a copy of said petition, and of said order, upon each of the defendants, and it shall be the duty of the defendants to file their answers to said petition within ten days. * * * At the trial [of] the findings of fact of said Commission as set forth in its

report shall be *prima facie* evidence of the matters therein stated."

This amendment, made to preserve the constitutionality of reparation proceedings, left the jurisdiction, in cases not involving reparation, to the Circuit Courts sitting as courts of equity, as originally provided. These cases arise either on a petition by the Commission or party interested, to enforce its order, or on an application for injunction by the party defendant, to restrain its enforcement. In either case, the entire record is before the court, and it can examine all the evidence before the Commission, or evidence in addition thereto, to determine the question of the *legality* of the order. The making of such an order is a ministerial function, though *quasi* judicial in the sense that it must be made in the course of an orderly procedure, in which the parties interested may be fairly heard and evidence fairly considered. These fundamental conditions appearing, the order is "*lawful*," and must be obeyed and enforced. It is as though Congress had enjoined as a duty the things embraced in such lawful order. It is in this view of a non-reparation case that the finding by the Commission of the reasonableness or unreasonableness of a rate is a finding of an ultimate fact, which will not be disturbed by a court of equity unless the legality of the proceeding in which it is made is successfully attacked.

In such cases, the judicial power of a court of equity is invoked, to enforce, the *lawful* order of the Commission, and involves no controversy requiring a trial by jury. It is the *lawful* order, *qua* order, of the Commission, as an administrative body, that is to be enforced; whereas, in reparation cases, there is a controversy at common law as to whether the damages awarded by the Commission or any damages are recoverable, and the mere order of the Commission, as we shall see, only

figures in the case as a necessary condition precedent to the bringing of the action, though the findings of facts by the Commission, as set forth in its report, are *prima facie* evidence of the matters therein stated. The damages sought are only recoverable by the verdict of a jury and judgment thereon, as in ordinary trials at common law.

Section 14 of the original Act of 1887 is left unchanged by this amendatory Act of 1889. By the Act of 1906 (commonly called the "Hepburn Act") important amendments were made to the Act of 1887, as amended by the Act of 1889. The most important of these amendments was the enlargement of the powers of the Commission, by authorizing them, not only to find the rates of interstate carriers unreasonable or excessive, but to determine and fix and make mandatory what, in the opinion of the Commission, under all the circumstances, would be a reasonable rate. Section 14 was amended so as to read as follows:

"That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises; and in case damages are awarded such report shall include the findings of fact on which the award is made."

The effect of this amendment is, that in *non-reparation cases*, for reasons peculiar to such cases, as above pointed out, the Commission henceforth need make no findings of fact on which it bases its conclusions. In reparation cases, however, it is still bound to make findings of all the facts, which it was its duty to make before the amendatory Act of 1906; not merely the facts relating to petitioner's particular tonnage and dates of shipment, but also all the facts on which the Commis-

sion based its conclusion as to the propriety of an award of damages.

Section 16 was also amended, so as to make still more clear the distinction between reparation and non-reparation cases. It provides that where, after hearing on a complaint, the Commission should determine that complainant is entitled to an award of damages, under the provisions of the Act, for a violation thereof, it "shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named. If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant * * * may file in the Circuit Court of the United States for the district in which he resides * * * a petition setting forth briefly the *causes* for which he claims damages, and the order of the Commission in the premises. Such suit shall proceed in all respects like other civil suits for damages, except that on the trial of such suit, the findings and order of the Commission shall be *prima facie* evidence of the facts *therein stated*. After other provisions, with which we are not here concerned, the section further emphasizes the distinction between reparation and non-reparation cases, as follows:

"If any carrier fails or neglects to obey any order of the Commission, *other than for the payment of money*, while the same is in effect, any party injured thereby, or the Commission in its own name, may apply to the Circuit Court in the district where such carrier has its principal operating office, * * * for an enforcement of such order. Such application shall be by petition, which shall state the substance of the order and the respect in which the carrier has failed of obedience, and shall be served upon the carrier in such manner as the court may direct, and the court shall prosecute such in-

quiries and make such investigations, through such means as it shall deem needful in the ascertainment of the facts at issue or which may arise upon the hearing of such petition. If, upon such hearing as the court may determine to be necessary, it appears that the order was regularly made and duly served, and that the carrier is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction, or other proper process, mandatory or otherwise," etc.

As we have remarked, section 14, as amended by the Act of 1906, relieved the Commission of the duty of stating specifically the findings of fact on which it based its conclusions in cases where damages were not awarded, and it is simply required to make a report, which shall state the conclusions of the Commission, together with its decision, order or requirement in the premises. The District Court, as a court of equity, will consider the order it is asked to enforce as valid, when it appears to have been made in the course of a regular hearing and to be founded upon evidence and facts proved. Much light is thrown upon a situation of this kind by the recent decision of the Supreme Court in the non-reparation case of Interstate Commerce Commission v. Louisville & Nashville R. R. Co., 227 U. S. 88, 33 Sup. Ct. 185, 57 L. Ed. ——. Mr. Justice Lamar, delivering the opinion of the court, said:

"In a case like the present the courts will not review the Commission's conclusions of fact (Int. Com. Comm. v. Dal., etc., Ry., 220 U. S. 251 [31 Sup. Ct. 392, 55 L. Ed. 448]), by passing upon the credibility of witnesses or conflicts in the testimony. But the legal effect of evidence is a question of law. A finding without evidence is beyond the power of the Commission. An order based thereon is contrary to law, and must, in the language of the statute, 'be set aside by a court of com-

petent jurisdiction.' 36 Stat. 551." So. Pac. Co. v. Int. Com. Comm., 219 U. S. 433, 31 Sup. Ct. 288, 55 L. Ed. 283.

So much for the conclusiveness of a decision or order of the Commission in a non-reparation case, where a court of equity is asked to enjoin the enforcement of such decision or order as the valid order of an administrative body. Such an order, if it stands the tests of legality laid down by the Supreme Court in the case above referred to, is conclusive upon a court of equity where such administrative order is sought to be enforced. But it is clear that, in a reparation case, though the award of damages by the Commission, following its finding of fact that a given rate was unreasonable, may be proved as the basis or condition precedent to the institution of the suit for damages authorized by the statute, it is not capable of enforcement as an administrative order, and is not of itself evidence of *liability, prima facie* or otherwise, in any judicial proceeding.

The amended Act of 1906, no less than the original Act, or the same as amended in 1889, expressly requires that the report of the Commission "shall include the findings of fact on which the award is made." The Act of 1889 and the Act of 1906 both provide that, where damages are awarded by way of reparation, they can be recovered or enforced only by a suit at common law in a Circuit Court of the United States, requiring a trial by jury. The Act of 1906 makes clear the plenary character of such a suit, by providing that it "shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated." It hardly needs that attention be called to what is so obvious, that both the "findings and order"

are *prima facie* evidence only of the *facts* therein stated. This is very far indeed from declaring that the order itself, awarding reparation, is *prima facie* evidence of damages, or the proper measure thereof.

As to the provisions covering reparation cases, Congress is no longer dealing with those matters which concern the practical management and conduct of the business of carriers and the regulation thereof *in futuro*, in the interests of the public generally, but is conferring a private right of action upon those who have suffered actual damage, by reason of such carriers' violation of some requirement of the Act. The conferring of such right of action, though incident to its power to regulate commerce, is not a regulation thereof. It makes redress of a private injury actually suffered, possible. It concerns the past and not the future conduct of the carrier, and, though this right of action for damages is qualified by making it depend in certain cases upon the precedent award of reparation by the Commission, such award is not of the nature of the administrative functions conferred on that body.

In the case of Western N. Y. & P. R. Co. v. Penn Refining Co., 137 Fed. 343, 70 C. C. A. 23, which was decided with reference to the original Act, as amended by the Act of 1889, we said:

"In proceedings at law under section 16, as amended for the enforcement of an order or requirement of the Commission, the parties are entitled to an impartial trial by jury, so conducted as to accord to them in full measure the enjoyment of their constitutional right. The procedure contemplated by the act and, unless waived, required by the Constitution, is jury trial, accompanied with the usual safeguards furnished by a proper application of the principles of evidence and the proper submission of the case to the jury."

The judgment in this case was affirmed by the Supreme Court, with no criticism of the language quoted. *Penn Refining Co. v. West N. Y. & P. R. R. Co.*, 208 U. S. 208, 28 Sup. Ct. 268, 52 L. Ed. 456.

With this understanding of the true intent and meaning of the Interstate Commerce Act of 1887, as amended in the respects hereinbefore discussed, we may state as conclusions fairly resulting therefrom, the following:

[1] (1) That a suit brought by one in whose favor the Commission has made an award of damages by way of reparation, under the authority of section 16 of the Act, is not a suit on the award, *qua* award, to recover the amount of the same, but a plenary suit for damages actually incurred by the plaintiff, by reason of the violation of the act by the defendant as conclusively found by the Commission.

(2) In the prosecution of such a suit, plaintiff may avail himself, without further proof, of the conclusive administrative finding or order of the Commission that the defendant was guilty of the violation of the act complained of, but must prove the actual damages incurred by him by reason of such violation and for which damages alone the Act makes the defendant carrier liable.

(3) In addition to this advantage given to the plaintiff in the prosecution of such a suit, plaintiff need not examine witnesses or offer other proof, in the first instance, of the facts stated in the findings or order of the Commission, such findings or order being *prima facie* evidence thereof.

[2] (4) Such suit is expressly required by the Act to be proceeded in "like other civil suits for damages," which can mean nothing less than that the "parties are

entitled to an impartial trial by jury, so conducted as to accord to them in full measure the enjoyment of their constitutional right."

(5) This essential right is not invalidated or impaired by the qualification of the rules of evidence, to the effect that "the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated."

(6) By reason of this qualification, the plaintiff may now avail himself of a new method to get these facts before the jury, and that method is this: There must be found somewhere and in some form sufficiently clear and sufficiently definite findings of the Commission, in which the needful facts are stated and by which the defendant is thus given due notice of the facts to be urged against him, so that he may, if he can, controvert their *prima facie* effect.

[3] (7) It does not necessarily follow, from a finding by the Commission that a given tariff rate established by the defendant is unreasonable and that a lower rate fixed by the Commission is reasonable, that plaintiff has suffered pecuniary damage, by reason of the exaction by defendant of the former rate, or, if any such damage has been suffered, that the difference between the rate abrogated and the lower rate established is the measure of such damage. If any damage is shown, it may be either greater or less than such difference.

(8) The authorization of a suit for damages by one claiming to be injured by a specific violation of the Act by a carrier, is not the imposition of a penalty in addition to the fines imposed and made payable to the government for every specific violation of a requirement of the Act, but a remedy for the recovery of damages actually in-

curred by a private person because of the wrongful act of the carrier.

We turn to the consideration of the case, as presented in the record before us. The plaintiffs, in their petition to the court below, set forth the fact of their application to the Interstate Commerce Commission, charging against the defendant companies the exaction of an excessive and unreasonable rate per ton for the transportation of pyrites cinder between points in the state of New York and the states of Pennsylvania and New Jersey. They then set forth the statements made by the Commission in two several reports, in the first of which, dated January 5, 1909, the Commission finds the rate as complained of unreasonable, and directs that it thereafter be reduced to a rate named, but declines to award damages by way of reparation. They also allege that the defendant companies duly complied with the aforesaid order of the Commission within the time limited therefor. The petition then states that on May 8, 1909, the petitioners filed a motion with the Commission for a rehearing, on the *question of reparation alone*, notice of the granting of which was duly given to all parties who appeared at the *taking of additional testimony by the petitioners*, and that after hearing and argument, the Commission made a report, awarding damages as prayed for. The petition then concludes with a statement of the demand made from the defendant companies for the payment of the sum awarded, and of their refusal to pay the same.

At the trial, the plaintiffs offered in evidence these reports and orders of the Interstate Commerce Commission, as *prima facie* evidence of the facts found therein. After objection by counsel for the defendant companies, the said reports and orders of the Commission were admitted for what they were worth as findings of fact.

Except that one witness was produced to prove that the award of the Commission had not been paid by the defendants, these two reports and orders constituted the only evidence produced by the plaintiffs, and after their admission by the court, plaintiff rested their case. No evidence was offered by the defendants.

The first report, and the order made thereon January 5, 1909, is as follows:

"This complaint involves the reasonableness of the rate of \$2 per gross ton on pyrites cinder over the lines of the defendant companies from Buffalo, N. Y., to points in the states of Pennsylvania and New Jersey.

"Iron pyrites is a high grade ore containing a large percentage of both sulphur and metallic iron. It is imported, chiefly from Spain, by fertilizer and chemical works located in this country. At these works this ore is burned in specially constructed furnaces, and from the arising sulphuric fumes sulphuric acid is obtained. The resultant product, pyrites cinder, contains approximately 60 per cent. of iron and a small residue of sulphur, usually from 1 to 3 per cent., the amount of residue determining the value of cinder to the iron manufacturer, as the presence of sulphur lessens the value of iron ore. This pyrites cinder, the rate upon which complainants claim to be excessive, is shipped to blasting furnaces in Pennsylvania and New Jersey, where the iron is subtracted and used in the manufacture of pig iron. It is alleged by the complainants that pyrites cinder being a low grade commodity, valued at about \$1 per gross ton at Buffalo, is unable to move at the \$2 per ton rate; the output at the chemical works at Buffalo being from 20,000 to 25,000 tons per year, only one-quarter of which is sold. Pyrites cinder is also produced at chemical works in Bayonne, N. J., where it is valued at \$2 per ton, the difference between the value at Buffalo and the

value at Bayonne being, it is claimed, accounted for because of the difference in freight rate to points of destination in New Jersey and Pennsylvania. This fact is emphasized by complainants that the iron pyrites bears a rate from New York, Philadelphia and Baltimore to Buffalo of but \$1.40 per ton, while the pyrites cinder for a return haul of but a part of the distance bears a rate of \$2 per ton, the cheaper commodity for a shorter haul being charged a greater amount than the higher grade commodity for a longer haul.

"The contention of the defendants by way of answer is that pyrites cinder should take a higher rate than iron ore between the same points, owing to the longer time consumed in loading the former than the later, and because iron ore is consumed in greater quantities than pyrites cinder. It appears that it does in fact take much less time to load iron ore than pyrites cinder, and a car load of iron ore is slightly heavier than a load of pyrites cinder. The rate on iron ore is \$1.45 per ton to points of destination carrying a \$2 rate on pyrites cinder.

"We are of the opinion that the rate on pyrites cinder should not exceed the rate on iron ore from Buffalo, and an order will be made accordingly. Reparation will not be awarded."

The second report and order of June 2, 1910, made upon a rehearing and investigation upon the question of reparation alone, as applied for by the plaintiffs, is as follows:

"In the report made by this Commission following an inquiry into the reasonableness of the rate of \$2 per gross ton exacted by the defendants for the transportation of pyrites cinder from Buffalo, N. Y., to points in the states of Pennsylvania and New Jersey, the rate was found excessive and the defendants were ordered to establish a rate not to exceed that contemporaneously

applying on shipments of iron ore between the same points. Reparation was denied. Naylor & Co. v. L. V. R. R. Co., 15 Interst. Com. Com'n R. 9.

"Pursuant to the Commission's order the defendants reduced the rate on pyrites cinder to \$1.45, the rate on iron ore. The complainant thereupon filed a motion for a rehearing upon the question of reparation, and after consideration by the Commission the motion was granted. *Additional evidence* was taken and the parties were heard in oral argument.

"We now find that the rate of \$2 per gross ton, assessed and collected by the defendants on the shipments giving rise to complaint, was unjust and unreasonable to the extent that it exceeded the subsequently established rate of \$1.45 per gross ton. Complainant is entitled to reparation on all shipments moving within the period of the statute of limitations."

Then follow the specific awards against the different defendant companies.

Plaintiffs contend that this hearing and investigation applied for by plaintiffs on the question of reparation alone, though had more than a year after the former report denying reparation, was a rehearing of the original application to the Commission, and that therefore the first report and such findings as were contained therein were part of the second report. While this may in some respects be true, it is also true that reparation had been denied at the first hearing, and that the second hearing on the question of reparation alone was a distinct proceeding on that issue. That it was so, appears by the statement of the Commission itself, that "additional evidence was taken and the parties were heard in oral argument." It does not follow that, because a given rate is found to be excessive and unreasonable, and is ordered to be discontinued and another rate estab-

lished, the complainant has suffered or is entitled to damages by way of reparation. Notwithstanding such a finding and order, there are many circumstances and considerations, such as the relations between the parties, want of knowledge by the defendant companies of the facts bearing on the question of reasonableness, lack of intention to violate the law in that respect, or lack of proof of actual damage suffered by plaintiffs, which might influence the Commission or a jury in coming to the conclusion that the applicant was not entitled to an award of reparation or damages. And this was the conclusion of the Commission at the first hearing. The fact that, while pyrites cinder was paying \$2.00 per gross ton, from Buffalo, New York, to points in Pennsylvania and New Jersey, iron ore was being charged \$1.45 per ton, from the ports of Philadelphia and Baltimore to Buffalo, and that such difference was unreasonable, was not sufficient at the first hearing to convince the Commission that the applicant had suffered or was entitled to pecuniary damages. As said by the Supreme Court in *Parsons v. Chicago & N. W. Ry.*, 167 U. S. 447, 17 Sup. Ct. 887, 42 L. Ed. 231:

"The only right of recovery given by the Interstate Commerce Act to the individual, is to the persons or person injured thereby for the full amount of damages sustained in consequence of any of the violations of the provisions of this Act; and before any party can recover under the Act, he must show, not merely the wrong of the carrier, but, that that wrong has operated to his injury."

And so we find that, in the second report in which reparation was awarded, the Commission states that additional evidence was taken and the parties were heard in oral argument. What this additional evidence was, or what were the facts which the Commission found,

established by it, is nowhere stated in the report. So that we have nothing in the way of the findings of facts required by the statute upon which the award of reparation by the Commissioners was made. The second report does not state that reparation was awarded upon any supposed findings of fact in the first report. Nor could it well have been, because the Commission, though finding the charge made by the defendant companies to be unreasonable, distinctly declined to find that plaintiffs were entitled to reparation. It is reasonable to conclude, therefore, that the award of reparation was made upon the facts established by the additional evidence. Section 14 of the Interstate Commerce Act, as amended, is peremptory in its requirement that in such case the Commission should include in their report the findings of fact on which their award was made.

But, even if the reference to the first report were sufficient to incorporate all its statements and supposed findings of fact in the second report, yet the facts of which those statements or findings are the *prima facie* evidence, are wholly insufficient to support the plaintiffs' claim for damages.

As the Commission in its first report had refused reparation, it was relieved by the amendment of 1906 from the duty of including in its report the findings of fact on which its conclusion as to the unreasonableness of the rate was based. Such findings are not to be expected in that report. The statements in the opinion that most nearly approach in character findings of fact, are that iron pyrites is a high grade ore containing a large percentage of both sulphur and metallic iron; that it is imported chiefly from Spain by fertilizer and chemical works; the ore is burned at these works, and from the arising sulphuric fumes, sulphuric acid is obtained; that the resultant product, pyrites cinder, con-

tains approximately 60 per cent. of iron and a small residue of sulphur, usually from 1 to 3 per cent., the amount of residue determining the value of the cinder to the iron manufacturer, as the presence of sulphur lessens the value of iron ore; that this pyrites cinder is shipped to blast furnaces in Pennsylvania and New Jersey, where the iron is subtracted and used in the manufacture of pig iron.

Though these facts be taken by the jury as *prima facie* true, they clearly have no relevancy to the demand of the plaintiffs for damages. What follows is a summary by the Commission of the contentions of the plaintiffs and the defendant companies, without any finding by the Commission as to the facts embodied therein, except that, in stating the contention of the defendant companies, it does affirm some of the facts upon which it is founded.

But for the reasons already stated, even if these statements of the contentions of the parties are to be regarded as findings of fact, we are still of opinion that, however they may have justified the finding of the Commission as to the unreasonableness of the charge on pyrites cinder, and the order for its reduction to the rate charged on iron ore, they do not justify the jury in awarding damages to the plaintiffs. It does not at all follow, as plaintiffs seem to be under the impression that it does, that because the Acts make certain findings of fact *prima facie* evidence of such facts, it also determines their probative force.

Counsel for plaintiffs apparently does not much rely, if at all, upon these statements in the first report of the Commission, to which we have referred, as findings of fact sufficient for his purpose. The case was apparently tried in the court below and has been argued here by counsel for the plaintiffs, on the theory that the Com-

mission having found as a fact the rate exacted by the carriers was unreasonable, that that fact, together with the award of reparation, as sets forth in the reports and orders of the Interstate Commerce Commission, must stand as *prima facie* proof of plaintiffs' case before the jury. As a matter of fact, that was plaintiffs' claim in their petition. What we have already said, should be sufficient to expose the fallacy of that theory. It is only as to the *facts* contained in the order that the order is made *prima facie* evidence. But the orders themselves of the Commission are not *prima facie* evidence as to the question of liability in a judicial proceeding. As well said by Judge McCall in *Darnell-Taenzer Lumber Company v. So. Pac. Co.* (C. C.) 190 Fed. 659:

"This must be so for two reasons: First, if the Congress intended that the order making the award should be taken as *prima facie* evidence of the liability of the carrier, then it would seem that it did a useless thing in requiring the Commission by the terms of the Act to make findings of fact in cases wherein awards for damages are allowed. * * * In such a case the court would be at a loss to know whether it would be controlled by the facts reported or the order made by the Commission in pronouncing its judgment."

But, upon this theory, the case was actually submitted to the jury, and presumably upon that theory determined by them. We find that the court below submitted the case to the jury, as follows:

"These amounts were awarded by the Commission against these railroads in favor of the plaintiff.

"The plaintiff has submitted to you evidence to establish the fact that these railroads have not, up to this time, paid these awards. They also submit to you the reports of the Interstate Commerce Commission, for the purpose of showing that that finding was made by

the Commission, and that these awards in favor of the plaintiff were made against these railroad companies. This same Act of 1887, the Interstate Commerce Act, section 16, says that such suit shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and the order of the Commission shall be *prima facie* evidence of the facts therein stated. You will notice that the Act of Congress says that the findings of the Commission shall be *prima facie* evidence of the facts therein stated. In the report, the facts stated are, as I have read them to you, that is, the Commission finds that \$2.00 a ton is an excessive charge on this one, and it is excessive to the extent of the difference between \$1.45 per ton and \$2.00 pr ton; and then it proceeds to state the number of tons that each of the railroads carried for the plaintiff at that excessive amount, and awards an amount to the plaintiff equal to the amount of the excessive charge on the number of tons carried. That is to say, it has found that these railroads owe this plaintiff the amount of money stated, and found in the report, because of the fact that the railroads charged them excessive freight. The act says that that shall be *prima facie* evidence. That means that it shall be established, *prima facie*, the facts therein contained unless contradicted or explained. The defendants have offered no evidence whatever, and leave the record as to the evidence the same as it was when the plaintiff closed its case. You have nothing, then, before you except that the Interstate Commerce Commission found that these railroads owe this plaintiff so much money, and that it has not yet been paid. The Act says that that finding of the Commission shall be *prima facie* evidence of the facts, and you will therefore say whether or not the plaintiff is entitled to re-

cover the amount of money claimed against each railroad respectively."

We have quoted all that was said in submitting the case to the jury, that we may do no injustice to the learned and usually careful judge who delivered the charge. It is impossible to say that the jury were not led to believe that they were justified in considering that the order of the Commission, that these defendant companies should pay the plaintiffs so much money, was *prima facie* evidence of the defendants' liability therefor.

Since the argument and determination of this case, the opinion of the Supreme Court in Pennsylvania Railroad Co. v. International Coal Mining Co., 230 U. S. 184, 33 Sup. Ct. 893, 57 L. Ed. ——, has been delivered, and by it the pivotal question involved in this case has, we think, been authoritatively and finally disposed of.

In that case, the Coal Mining Company had sued the Pennsylvania Railroad Company, as a carrier in interstate commerce, for \$37,268.00, being the difference between the published tariff rates paid by the plaintiff and lower rates resulting from rebates from the published rates allowed other coal dealers making like shipments over the same road, from the same point to the same destination.

It was objected by the defendant that, inasmuch as the suit was instituted by plaintiff in the court below, without first having made complaint to the Interstate Commerce Commission, and without any finding by that body that the facts stated constituted a rebate or discrimination prohibited by the Act, the court had no jurisdiction to entertain such suit. In disposing of this

objection and sustaining the jurisdiction of the court, Mr. Justice Lamar, in delivering the opinion of the court, said:

"The tariff, so long as it was of force, was, in this respect, to be treated as though it had been a statute, binding as such upon railroad and shipper alike. If, as a fact, the rates were unreasonable, the shipper was nevertheless bound to pay and the carrier to retain what had been paid, leaving, however, to the former, the right to apply to the Commission for reparation. In view of this imperative obligation to charge, collect, and retain the sum named in the tariff, there was no call for the exercise of the rate-regulating discretion of the administrative body to decide whether the carrier could make a difference in rates between free and contract coal. For whether it could do so or not, the refund of any part of the tariff rate collected was unlawful. It could not have been legalized by any proof, nor could the Commission by any order have made it valid. The rebate being unlawful, it was a matter where the court, without administrative ruling or reparation order, could apply the fixed law to the established fact that the carrier had charged all shippers the published or tariff rate, and refunded a part to a particular class. This departure from the published tariff was forbidden, and section 8 (24 Stat. 382) expressly provided that any carrier doing any act prohibited by the statute should be 'liable to the person * * * injured thereby for the full amount of damages sustained in consequence of any such violation, * * * together with reasonable * * * attorneys' fee.'

"2. But although this suit was brought to enforce a cause of action given by this section to any person injured, it is a noticeable fact that in its pleading the

plaintiff does not claim to have been damaged, and there is neither allegation nor proof that it suffered any injury. It contends, however, that this was not necessary, for the reason that, as matter of law, it was entitled to recover as damages the same rate per ton on all plaintiff's shipments as had been rebated any other person, on any of his tonnage, shipped at the same time, over the same route."

The question here raised is in principle precisely that raised in the present case. Here, as there, in its pleading the plaintiff does not claim specific damages but contends that, as matter of law, it was entitled to recover, as damages, the difference between the tariff rate charged and the reasonable rate established by the Commission. No distinction in principle can be predicated upon the fact that, in the case under consideration by the Supreme Court, the action was based directly upon an alleged violation of section 2 of the Act, prohibiting the giving by a carrier of rebates, etc., as therein defined, and as to which no complaint to the Commission was required before bringing a suit. Nor can any distinction be based upon the bringing of that suit under section 8, instead of under section 16.

In the present case, the action is brought under the provisions of section 16, authorizing a suit for damages, after complaint to and an order made by the Interstate Commerce Commission, but it is a private suit for damages, and not for a penalty, and, as expressly enjoined by the Act, is to be proceeded in "in all respects like other civil suit for damages." Otherwise, it would not comply with the mandate of the seventh amendment to the Constitution. There can be no question, therefore, but that what is said by the Supreme Court in regard to the nature of the damages recoverable in a suit before it, is

applicable to the damages sought to be recovered in this suit.

We again quote somewhat at length the language of Mr. Justice Lamar in this respect. Referring to the case of Parsons v. Railway, 167 U. S. 460, 17 Sup. Ct. 892, 42 L. Ed. 231, and quoting therefrom, with approval, the following language:

"Before any party can recover under the Act, he must show not merely the wrong of the carrier, but that that wrong has in effect operated to his injury."

In the case before us, the wrong of the carrier is conclusively shown by the administrative finding of the Commission. He then says:

"Congress had not then and has not since given any indication of an intent that persons not injured might, nevertheless, recover what, though called damages, would really be a penalty, in addition to the penalty payable to the government. * * *

"The statute gives a right of action for *damages* to the *injured* party, and by the use of these legal terms clearly indicated that the damages recoverable were those known to the law and intended as compensation for the injury sustained. It is elementary that in a suit at law both the fact and the amount of the damage must be proved. And although the plaintiff insists that in all cases like this the fact and amount of the pecuniary loss is matter of law, yet this contention is not sustained by the language of the act, nor is it well founded in actual experience, as will appear by considering several usual and every-day instances suggested by testimony in this record. For example:

"If plaintiff and one of the favored companies had both shipped coal to the same market on the same day, the rebate on contract coal may have given an advantage which may have prevented the plaintiff from selling,

may have directly caused it expense, or may have diminished or totally destroyed its profits. The plaintiff, under the present statute in any such case being then entitled to recover the full damages sustained; but the plaintiff may have sold at the usual profit all or a part of its 40,000 tons at the regular market price, the purchaser, on his own account, paying freight to the point of delivery. In that event not the shipper, but the purchaser, who paid the freight would have been the person injured, if any damage resulted from giving rebates. To say that the seller and buyer, shipper and consignee, could both recover, would mean that damages had been awarded to two where only one had suffered; * * * for it [the plaintiff] argues that, whenever it showed that a lower rate had been charged on contract coal sold in 1899, it was entitled to recover the same rate on shipments made by it to the same place on the same day in 1901, even though there had been no competition in the two sales, and without proof that there had been any fall in market prices, diminution in its profits, decrease in its business, or increase in its expenses. It claimed that it was a mere matter of mathematics, and that for every rebate on contract coal, plaintiff was entitled to a like reduction on every ton of its coal without further proof of damage or injury.

"6. To adopt such a rule and arbitrarily measure damages by rebates would create a legalized, but endless, chain of departures from the tariff; would extend the effect of the original crime; would destroy the equality and certainty of rates; and, contrary to the statute, would make the carrier liable for damages beyond those inflicted, and to persons not injured. The limitation of liability to the persons damaged, and to an amount equal to the injury suffered, is not out of consideration for the

carrier who has violated the statute. On the contrary, the Act imposes heavy penalties, independent of the amount of rebate paid, and as each shipment constitutes a separate offense, the law, in its measure of fine and punishment, is a terror to evil doers. But for the public wrong and for the interference with the equal current of commerce these penalties or fines were made payable to the government. If by the same act a private injury was inflicted, a private right of action was given. But the public wrong did not necessarily cause private damage, and when it did, the pecuniary loss varied with the character of the property, the circumstances of the shipment, and the state of the market; so that, instead of giving the shipper the right to recover a penalty fixed in amount or measure, the statute made the guilty carrier liable for the full amount of damages sustained—whatever they might be, and whether greater or less than the rate of rebate paid.

"7. This conclusion, that the right to recover is limited to the pecuniary loss suffered and proved, is demanded by the language of the statute, the construction put upon it years ago in the Parsons Case, and is the view taken in the only other case we find in which this question, under the Act to Regulate Commerce, has been construed. In Knudsen v. Michigan Central R. R., 148 Fed. 974 [79 C. C. A. 52], it was said by the Circuit Court of Appeals for the Eighth Circuit that to 'support a recovery under this section there must be a showing of some specific pecuniary injury. A cause of action does not necessarily arise from those acts or omissions of a common carrier that may subject it to a criminal prosecution by the government or to corrective or coercive proceedings at the instance of the Commission.'"

[4] In conclusion, we are of opinion, first, that there were no sufficient findings of fact in these reports of the Commission, as required by the statute; second, that if any of the statements in the first report could properly be considered as findings of fact, within the meaning of the statute, so as to make such findings *prima facie* evidence of the facts found, they were not sufficient to support the plaintiffs' claim or make out even a *prima facie* case for damages. The plaintiffs were not bound to rely upon *prima facie* evidence. The whole field of inquiry was open to them,—the production of such testimony as could be found bearing upon the issue, and notably the additional evidence referred to by the Commission in its second report. Failing to produce evidence *prima facie* sufficient to show actual damage suffered, and the amount thereof, the defendants were not put to a reply, and the plaintiffs must suffer the consequence of their default.

We think for the reasons stated, the assignment of error, based on the exception to the refusal of the court to give binding instructions in favor of the defendant companies, must be sustained, and the judgment of the court below reversed. And it is so ordered.

OCT 7 1914
JAMES D. MAHER
CLERK

IN THE
Supreme Court of the United States.

OCTOBER TERM, 1914.

No. 435.

HENRY E. MEEKER,

Petitioner,

v.s.

LEHIGH VALLEY RAILROAD COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE THIRD CIRCUIT.

**BRIEF FOR LEHIGH VALLEY RAILROAD
COMPANY, RESPONDENT.**

EDGAR H. BOLES,
Solicitor for Respondent.

JOHN G. JOHNSON,
FRANK H. PLATT,
GEORGE W. FIELD,
Counsel.



In the Supreme Court of the United States,

OCTOBER TERM, 1914.

HENRY E. MEEKER,
Petitioner,

against

LEHIGH VALLEY RAILROAD COMPANY,
Respondent.

No. 435.

**ON WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE THIRD CIRCUIT.**

BRIEF FOR RESPONDENT.

Statement.

This action was brought to recover \$12,907.18, with interest (R. 6). The amount covers a claim made by Mr. Meeker as a shipper of anthracite coal.

From July 17, 1907, to February 2nd, 1910, Mr. Meeker shipped anthracite coal from the Wyoming region of Pennsylvania to tidewater at Perth Amboy, New Jersey, over the Lehigh Valley Railroad. He paid tariff rates.

He now claims that during said period he paid as freight charges \$136,663.41; that the charges were excessive; that the reasonable charge for the services would not have exceeded \$125,849.81. He claims the difference, namely, \$10,813.60 as excessive charges (R. 10). Interest upon the various amounts going to make up the \$10,813.60 amounted as of July 15th, 1912, to \$12,907.18, which is the amount sued for (R. 6).

Action was commenced September 3, 1912, by the filing of the petition (R. 1). On October 5, 1912, defendant filed its plea of not guilty (R. 45).

The issues were tried before Judge Holland and a jury November 12, 1912 (R. 46). A verdict was rendered for the plaintiff for the full amount with interest (R. 63).

December 19, 1912, judgment was entered for \$13,161.78 (R. 64). The court also ordered that plaintiff's counsel be allowed \$2,500 as counsel fee for his services in a certain proceeding before the Interstate Commerce Commission; and a further sum of \$2,500 for services in this action (R. 63).

Thereupon defendant filed its bill of exceptions, assignments of error, and its petition for a writ of error (R. 63-65). Upon order (R. 65) the writ of error was issued December 30, 1912 (R. 2).

Mr. Meeker is a coal dealer. He purchased anthracite coal in the Wyoming region of Pennsylvania and shipped it to tidewater at Perth Amboy, New Jersey (R. 47). He shipped his coal over the Lehigh Valley Railroad (R. 47).

April 13, 1910, Mr. Meeker filed a complaint with the Interstate Commerce Commission against the Lehigh Valley Railroad Company (R. 5). In his complaint he

asked the Commission to compel the Railroad to reduce its rates on anthracite coal from the Wyoming region in Pennsylvania to Perth Amboy, New Jersey. The rates then in effect (April 13, 1910) were \$1.55 per gross ton of 2,240 pounds for prepared sizes of coal (including egg, stove and chestnut), \$1.40 per gross ton on pea coal, \$1.20 per gross ton on buckwheat coal, and \$1.10 per gross ton on sizes of anthracite coal smaller than buckwheat coal (R. 48). He asked that all these rates be reduced to one dollar per ton.

In his complaint he also demanded reparation based upon shipments made from time to time between July 17, 1907 and February 2, 1910. He claimed that between July 17, 1907 and February 2, 1910, he had made various shipments from the Wyoming region of Pennsylvania to Perth Amboy, New Jersey, and had paid at tariff rates \$136,663.41 (R. 10). He claimed as reparation the difference between this amount and what the charges would have amounted to at the rate of \$1.00 per ton.

May 7th, 1912, the Commission submitted a report, at the conclusion of which it stated:

"On basis of our decision in No. 1180, and upon consideration of the evidence submitted at the hearing of the present case regarding the amount of reparation due complainant, we now find that the rates exacted by defendant for the transportation of anthracite coal from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., during the period from April 13, 1908, to April 13, 1910, were unreasonable to the extent that they exceeded rates of \$1.40 per gross ton on prepared sizes, \$1.30 on pea and \$1.15 on buckwheat; that complainant shipped from said point of origin to said destination during the period above set forth 46,772.02 tons of coal of prepared sizes, 26,972.06 tons of pea

coal and 22,004.09 tons of buckwheat coal; that complainant paid charges thereon, amounting to \$136,663.41, at the rates herein found to have been unreasonable, and was damaged to the extent of the difference between the amount which he did pay and \$125,849.81, the amount which he would have paid at the rates above found reasonable; and that he is, therefore, entitled to an award of reparation in the sum of \$10,813.60, with interest amounting to \$1,526.53 upon the individual charges comprising same sum from the dates of payment thereof to September 1, 1911, together with interest on said sum of \$10,813.60 from the 1st day of September, 1911" (R. 10).

The report from which the above paragraph is quoted refers to two proceedings before the Commission, a former proceeding brought by Henry E. Meeker and Caroline H. Meeker, as co-partners, and a later proceeding brought by Henry E. Meeker (R. 8). The decision in "No. 1180," referred to in the paragraph quoted above is the report of June 8, 1911 (R. 12) in the former proceeding, brought by Henry E. Meeker and Caroline H. Meeker as co-partners.

As appears from the report of May 7, 1912, the first proceeding covered reparation claims during the period from November 1, 1900, to July 17, 1907 (R. 9). The second proceeding, in which Henry E. Meeker was complainant and which is the proceeding referred to in the petition in this suit, covered reparation claims beginning with July 17, 1907 (R. 9). In the report of May 7, 1912, the Commission stated:

"With the exception of the reparation features, the issues involved in No. 3235 have been passed upon by the Commission in No. 1180. The latter case covered the period from November 1, 1900, to July 17, 1907, while the instant case is designed to secure reparation

upon shipments which moved between July 17, 1907, and April 13, 1910. The petition in the present case, therefore, resolves itself into a prayer for reparation on shipments moving subsequent to the period covered by the original report, on basis of the conclusions announced in that report. In No. 1180 the complaint attacked the reasonableness of rates charged by defendant for the transportation of various sizes of anthracite coal from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., and asked reparation. On June 8, 1911, the Commission rendered its decision in that case. The petition in the present case was filed on April 13, 1910, or about a year prior to our decision in No. 1180. As before stated, it attacks the same rates that were found unreasonable in No. 1180, and asks reparation on shipments moving from July 17, 1907, to April 13, 1910" (R. 9).

The petition in the second proceeding before the Commission was filed by Mr. Meeker on April 13, 1910 (R. 5), at a time when the first proceeding was still pending undetermined before the Commission.

Section 16 of the Act to Regulate Commerce provides that claims for reparation must be filed with the Commission within two years after the cause of action accrues. The second proceeding was brought to prevent the two year limitation from running against claims which accrued after the first petition was filed, and which, therefore, were not covered by the first petition.

As stated, the second complaint covers the period from July 17, 1907, to April 13, 1910, but the two year limitation applied to cut off claims which accrued between July 17, 1907, and July 17, 1908 (R. 10).

On May 7, 1912, the Commission also handed down its order, in which it stated:

"It is ordered, That defendant Lehigh Valley Railroad Company be, and it is hereby authorized and required to pay unto complainant, Henry E. Meeker, on or before the 15th day of July, 1912, the sum of \$10,813.60, with interest at the rate of 6 per cent per annum, amounting to \$1,526.53 upon the various individual charges comprising said sum, from the dates of payment thereof to September 1, 1911, as itemized in complainant's Exhibit 1, together with interest at the rate of 6 per cent per annum on said sum of \$10,813.60 from September 1, 1911, as reparation for unreasonable rates charged for the transportation of various shipments of anthracite coal from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., which rates so charged have been found by this Commission to have been unreasonable, as more fully and at large appears in and by said report of the Commission" (R. 11, 12).

In making its order (R. 11) the Commission sought to comply with section 16 of the Act to Regulate Commerce, which provides: "That if, after hearing on a complaint made as provided in section 13 of this act, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this act, for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named."

Section 16 also provides that if the carrier does not comply with the order the complainant may file in the circuit court a petition setting forth his claim and the order of the Commission; and that such suit shall proceed in all respects like other civil suits for damages, except that on the trial the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated. There is a further provision as to costs

and attorney's fees, and the provision that "a petition for the enforcement of an order for the payment of money shall be filed in the Circuit Court * * * within one year from the date of the order and not after."

The order was served upon the defendant railroad (R. 56); and the railroad did not comply with such order for the payment of money within the time limit of the order.

Thereupon Mr. Meeker brought this action in the District Court.

The action was commenced by the filing of a petition on September 3, 1912 (R. 3). This petition makes claim for the amounts awarded by the Commission in its order, which the railroad has refused to pay. Attached to the petition as exhibits are the Commission's report of May 7, 1912, and its order of May 7, 1912, together with a long opinion by the Commission filed June 8, 1911, in the former proceeding brought by Henry E. Meeker and Caroline H. Meeker, as co-partners (R. 8, 11, 12). Also attached to the petition is an order in the former proceeding dated June 8, 1911, which order relates to future rates (R. 44).

The petition in this action alleges that from April 13, 1908, to April 13, 1910, Meeker paid on shipments of coal from the Wyoming region to Perth Amboy tariff rates of \$1.55 per ton for prepared sizes, \$1.40 for pea coal, and \$1.25 for buckwheat coal; that those charges were excessive; that reasonable charges would not have exceeded \$1.40 per gross ton on prepared sizes, \$1.30 on pea and \$1.15 on buckwheat coal (R. 4). The petition claims a recovery of the alleged excessive charges \$10,813.60, which, with interest to July 15, 1912, amounted to \$12,907.18 (R. 3), and demands judgment for said sum of \$12,907.18 with interest from July 15, 1912 (R. 6).

Defendant's plea, filed October 5, 1912, is as follows:

"The defendant, the Lehigh Valley Railroad Company, for a plea in the above stated case pleads Not Guilty; and further pleads the bar of the Statutes of Limitation applicable to the plaintiff's claim; and for further plea in this behalf defendant avers that the Interstate Commerce Commission has no jurisdiction to make the findings and order of reparation which the plaintiff seeks to enforce by this proceeding, and further that there was before the Commission no substantial evidence to sustain said findings and said order" (R. 45).

At the trial the plaintiff put in evidence the report of the Commission dated May 7, 1912, and the reparation order dated May 7, 1912. (Said report and order are offered at page 52, received over objection at page 56 and printed at pages 8 and 11.)

The plaintiff also offered in evidence the opinion of the Interstate Commerce Commission in the proceeding brought by Henry E. Meeker and Caroline H. Meeker against the Railroad, which opinion is dated June 8, 1911; and also offered the order of the Commission in the same proceeding, fixing the future rates, which order is also dated June 8, 1911 (R. 12). (Said opinion and order in said proceeding brought by Henry E. Meeker and Caroline H. Meeker were offered in evidence at page 48, received over objection at page 49 and printed at page 12.)

The plaintiff Meeker claimed at the trial and now claims that by placing in evidence four papers, viz.: (1) The report of the Commission dated May 7, 1912, in the proceeding brought by Mr. Meeker; (2) The reparation order dated May 7, 1912, in the same proceeding; (3) The report of the Commission of June 8, 1911, in the former proceeding, brought by Henry E. Meeker and

Caroline H. Meeker; and (4) The order as to the future rate in that case, dated June 8, 1912; he has proved his case and is entitled to judgment for the full amount. Taking this view of the case, the learned trial Judge instructed the jury that plaintiff in the absence of countervailing evidence to the contrary was entitled to the full amount claimed (R. 59).

Respondent's Points.

The questions of law raised upon this writ will be discussed under the following heads:

FIRST: Plaintiff has failed to prove by competent evidence that the Railroad violated the Commerce Act. Plaintiff relied for his proof, upon the reports and orders of the Commission. These do not prove that unlawful rates were charged.

SECOND: Plaintiff has failed to prove by competent evidence that Mr. Meeker sustained damage. The measure of damages, if any, should be the loss to Mr. Meeker as the result of the alleged unreasonable rate. It does not follow from the conclusion of the Commission that an established rate is unreasonable in so far as it exceeds a stated amount, that a shipper who paid the established rate has been damaged, or that his damage, if any, should be measured by the difference between the two amounts.

THIRD: The Commission's opinion of June 8, 1911 in a former and separate proceeding was not admissible in an action for damage relating to entirely different causes of action. Said opinion contains statements, arguments and conclusions which the act does not purport to

make admissible as *prima facie* evidence in a suit for damage. In admitting the report in evidence the trial Court prejudiced the rights of the defendant, making it thereafter impossible for the defendant to place before the jury its side of the case unembarrassed by such incompetent and misleading statements.

FOURTH: Section 16 of the Commerce Act is unconstitutional in so far as it deprives the defendant in a damage suit of a fair trial by jury.

FIFTH: The allowances for counsel fees are invalid and excessive.

FIRST POINT.

Plaintiff has failed to prove by competent evidence that the Railroad violated the Commerce Act. Plaintiff relied for his proof upon the reports and orders of the Commission. These do not prove that unlawful rates were charged.

At the trial defendant objected to the admission of the opinions of the Commission on this ground (R. 50 and 53). Defendant requested the Court to direct a verdict for the defendant upon this ground, which request was denied and exception duly taken (R. 61). The assignments of error in point are at page 69 of the record.

The Court charged the jury that the reports and orders of the Commission were *prima facie* evidence of the facts found in the reports and sufficient upon which to base a verdict in favor of the plaintiff for the amount claimed, in the absence of any countervailing evidence

to the contrary (R. 59). To this defendant duly excepted (R. 60).

It will be unnecessary to repeat in this brief the discussion of this point contained in the brief before this Court in the case of Henry E. Meeker, as surviving partner, etc., against this defendant, No. 434.

SECOND POINT.

Plaintiff has failed to prove by competent evidence that Mr. Meeker sustained damage. The measure of damages, if any, should be the loss to Mr. Meeker as the result of the alleged unreasonable rate. It does not follow from the conclusion of the Commission that an established rate is unreasonable in so far as it exceeds a stated amount, that a shipper who paid the established rate has been damaged, or that his damage, if any, should be measured by the difference between the two amounts.

Defendant excepted to the charge of the Court to the effect that the reports were sufficient to sustain the verdict (R. 60). The defendant asked the Court to charge that there was no evidence that petitioner was in any way damaged, which request was denied and exception duly taken (R. 62). Error was duly assigned (R. 67, 69).

It will be unnecessary to repeat in this brief the discussion of this point contained in the brief before this Court in the case of Henry E. Meeker, as surviving partner, etc., against this defendant, No. 434.

THIRD POINT.

The Commission's opinion of June 8, 1911, in a former and separate proceeding was not admissible in an action for damage relating to entirely different causes of action. Said opinion contains statements, arguments and conclusions which the act does not purport to make admissible as *prima facie* evidence in a suit for damages. In admitting the report in evidence the Trial Court prejudiced the rights of the defendant, making it thereafter impossible for the defendant to place before the jury its side of the case unembarrassed by such incompetent and misleading statements.

The defendant objected to the admission of the opinions on this ground. The objection was overruled and exception taken (R. 50, 53). Further objection to the admission of the report of June 8, 1911, was made on the ground that it was not the report in the proceeding specified in the petition in this action and that section 16 of the Act did not purport to make admissible reports in other proceedings, which objection was also overruled and exception taken (R. 48, 49). Error was duly assigned (R. 66).

Section 16 provides that in a reparation suit the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated. The findings and order referred to are the findings and order of the Commission, awarding the damages, to recover which the action is brought. Section 16 does not provide that the findings and order of the Commission in any proceeding ever had before it shall be *prima facie* evidence in this

action, nor does it provide that the findings and order of the Commission in any proceeding ever had before it between these same parties shall be *prima facie* evidence in this action.

In the opinion in the first proceeding before the Commission there is inserted the following statement: "In a later complaint, filed April 13, 1910, No. 3235, styled *Henry E. Meeker vs. Lehigh Valley Railroad Company*, complainant seeks reparation on the basis of a rate of \$1.00 on all grades of coal shipped during the period July 1, 1907, to April 1, 1910, alleging a total overcharge during said period of \$55,290.73. As the subject-matter of the two complaints is the same, in so far as the reasonableness of the rates is concerned, the disposition of the later case will perhaps be determined by the conclusions reached in this case" (R. 20).

The report of the Commission dated May 7th, 1912, constitutes the supplemental report in the first proceeding before the Commission and the only report made by the Commission in the second proceeding. That is to say, the only report made by the Commission in the second proceeding is contained in the last paragraph on page 9 and on page 10 of the record.

At the beginning of this report the Commission states: "With the exception of the reparation features, the issues involved in No. 3235 (the second proceeding) have been passed upon by the Commission in No. 1180. * * * The petition in the present case, therefore, resolves itself into a prayer for reparation on shipments moving subsequent to the period covered by the original report, on the basis of the conclusions announced in that report" (R. 9, 10).

The Commission has not attempted to make the opinion in the first proceeding a part of the report in the second

proceeding. In fact, the Commission has stated that the second proceeding has resolved itself into a prayer for reparation (R. 10). It is doubtful if the Commission could, by referring to its report in a separate proceeding, make that report *prima facie* evidence in an action relating to a subsequent proceeding. It is not necessary to discuss that question because the Commission has not attempted to do so. The order of the Commission in the second proceeding makes the report of May 7th, 1912, a part of the order. It neither refers to nor makes a part of itself, the opinion of June 8th, 1911. We can find no evidence of an intention on the part of the Commission to so word its report and order in the second proceeding that the opinion in the first proceeding could be used as *prima facie* evidence in this action.

It will be unnecessary to repeat in this brief the discussion of this point contained in the brief before this Court in the case of Henry E. Meeker, as surviving partner, etc., against this defendant, No. 434.

FOURTH POINT.

Section 16 of the Commerce Act is unconstitutional in so far as it deprives the defendant in a damage suit of a fair trial by jury.

Defendant objected on this ground to the receipt in evidence of the opinions and orders of the Commission, which objection was overruled and exception taken (R. 50, 52 and 54). Defendant requested the trial Court to direct a verdict for the defendant upon this ground. This request was denied and exception taken (R. 60). The Court charged that the reports and

orders of the Commission were *prima facie* evidence of the facts found in the report and sufficient upon which to base a verdict in favor of the plaintiff for the amount claimed in the absence of countervailing evidence to the contrary, to which defendant duly excepted (R. 59, 60). The assignments of error in point are at pages 66 and 68 of the record.

It will be unnecessary to repeat in this brief the discussion of this point contained in the brief before this Court in the case of Henry E. Meeker, as surviving partner, etc., against this defendant, No. 434.

FIFTH POINT.

The allowances for counsel fees are invalid and excessive.

Exception was taken to the granting of these fees (R. 63). The allowance of these fees is assigned as error (R. 70).

Without repeating the argument of this point contained in the last point of the brief in action No. 434, we call attention to the fact that the allowance of \$2,500 for services in the proceeding before the Commission is entirely unwarranted and entirely without authority of the statute. Such allowance before the Commission is grossly excessive, inasmuch as the report states that the hearing before the Commission consisted merely in putting in a schedule of shipments, the correctness of which the defendant admitted (R. 9 and 10). An allowance of \$2,500 for services in this suit is also grossly excessive. If Section 16 of the Act is valid it has certainly furnished the plaintiff with a simple remedy. His counsel

has taken advantage of it in all its simplicity. The Act limits the award to "a reasonable attorney's fee." This case has followed the earlier case, as the tail follows a kite. The services have been but nominal. The amount recovered is \$13,161. The counsel fees allowed aggregate \$5,000, or forty per cent of the verdict.

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